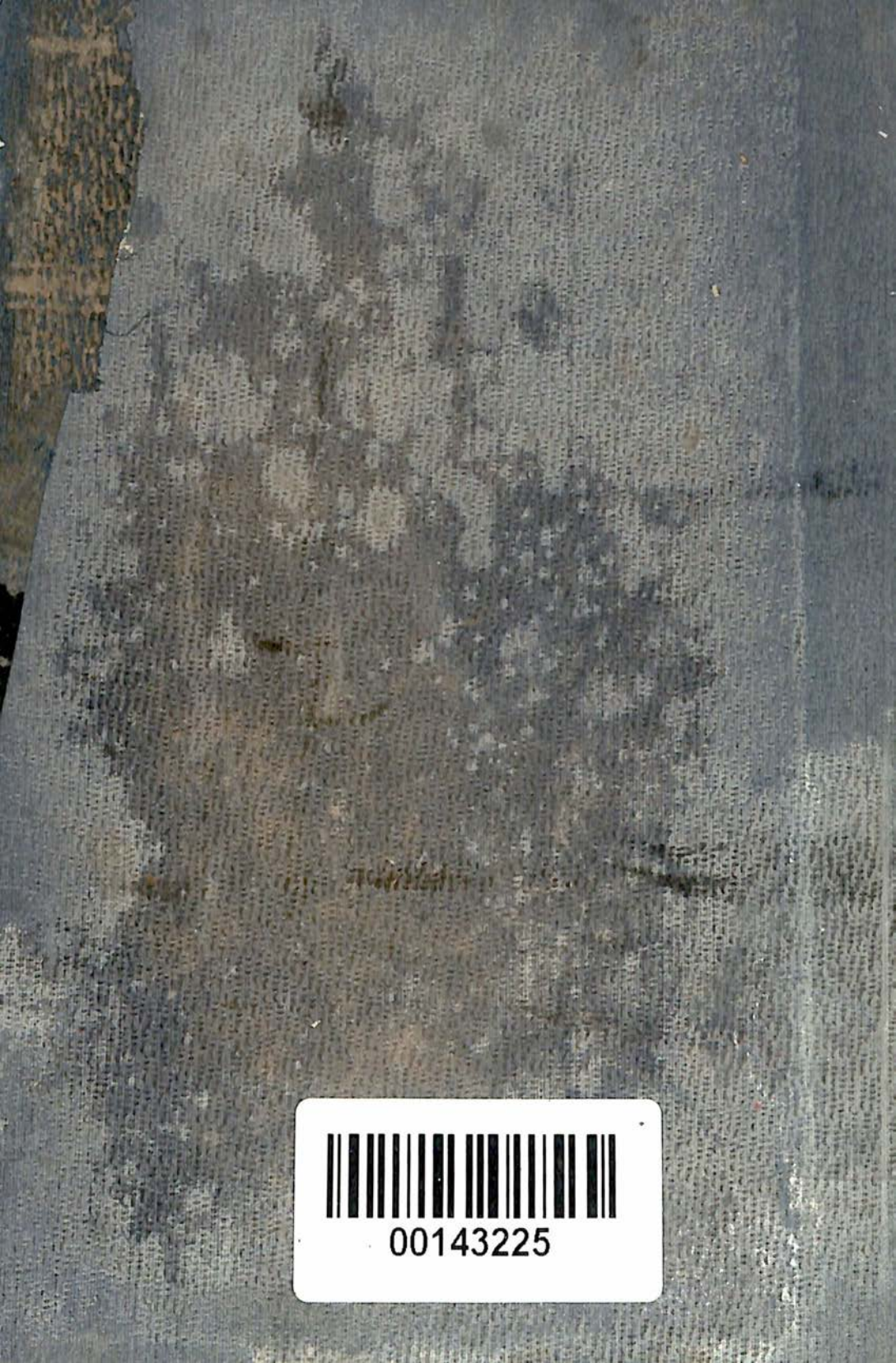
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THE

INSTITUTIONS

OF

THE ENGLISH GOVERNMENT;

BEING AN ACCOUNT OF

THE CONSTITUTION, POWERS, AND PROCEDURE,

OF ITS LEGISLATIVE, JUDICIAL, AND ADMINISTRATIVE

COPIOUS REFERENCE TO ANCIENT AND MODERN AUTHORITIES.

BY

HOMERSHAM COX, M.A.,

BARRISTER-AT-LAW, AUTHOR OF 'THE BRITISH COMMONWEALTH,' ETC.

143225

LONDON:

H. SWEET, 3, CHANCERY LANE, FLEET STREET,

LAW BOOKSELLER AND PUBLISHER.

1863.

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TO THE

RIGHT HON. WILLIAM EWART GLADSTONE, M.P.,

CHANCELLOR OF THE EXCHEQUER,

THIS WORK IS DEDICATED, BY PERMISSION,

AS A

TRIBUTE OF RESPECT FOR HIS PROFOUND KNOWLEDGE

OF THE

PRINCIPLES OF THE BRITISH GOVERNMENT.

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PREFACE.

THE object of the following pages is to collect from ancient and modern authorities a general account of the British Government, of the powers and practice of its several departments, and of the constitutional principles affecting them.

Notwithstanding the multitude of books extant which relate to the British Constitution, there has not hitherto been published any practical compendious account of it compiled from authentic sources, and describing in detail the modern functions of its institutions. The works which treat of the government of this country are of two classes —special and general: the one class are confined to particular portions of the subject; the other, though they deal with it generally, consider it chiefly in its theoretical or historical aspects. Of the former class an eminent example is Blackstone's Commentaries, which describe minutely the Judicature, and with less minuteness the Legislature, but expressly avoid description of the Administrative departments. To the latter class belong the treatise of De Lolme, and many more recent works, which survey in a general manner the history or theory of the British Go-

vernment, but give little detailed information respecting its institutions, and very few references to authorities.

The statements of the present Work are uniformly supported by references to standard sources of information so numerous and various, that they will probably serve as a guide in the investigation of almost every important constitutional question, respecting which precedents and authorities are to be found. With respect to the Legislature and Judicature, the difficulty of compiling a compendium arises, not from the paucity of materials, but from the abundance of them. Besides the stores of constitutional learning contained in unpublished records, the printed materials are so extensive, that probably no single life would suffice to exhaust them. With respect to the Administrative Government, the difficulties of investigation are of a very different nature. Writers on the Laws and Constitution of England have almost uniformly avoided any detailed account of the administrative institutions of this country, and there is actually no treatise which gives a connected account of their legal powers and relations to the other branches of Government. Until recently, also, there have been but few printed sources of information respecting the history of the administrative departments; but this want has been of late years partly supplied by the publication of various works containing copies or abstracts of State papers and records. The materials, therefore, from which the following account of these departments has been compiled, exist in a very scattered form. For the history of them recourse has been had to the sources of information just mentioned, and to various historical collections and memoirs, in which occasional notices of the administrative offices are found interspersed. The account

of their legal powers and procedure is founded principally upon the patents of great offices of State, Acts of Parliament, judicial decisions, and reports of Parliamentary committees and commissions of inquiry.

In order to confine this Work within the limits of a compendium, it has been deemed advisable to exclude all researches of purely antiquarian interest, and all merely speculative politics. It would not, indeed, have been expedient to have excluded all historical and theoretical researches, for there are many important provisions of the Constitution which would be unintelligible without reference to them. But throughout this Work such researches have been carefully limited to the purpose of illustrating the use and operation of established principles and institutions of Government. *Scire autem propriè est rem ratione et per causam cognoscere.*

For the sake of brevity, it has been generally deemed expedient to omit statements of authorities in the text, and to confine them to the notes. This arrangement seemed the only means of combining the advantages of an elementary treatise with those of a guide to the fuller study of the Constitution, and will account for the number of notes throughout the book. It may be added that the references, amounting to several thousands in number, have been collected diligently during many years in the intervals of the toils of a laborious profession, and have all been taken directly from the authorities cited.

H. C.

London, April, 1863.

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ADDENDA ET CORRIGENDA.

Page 15, note (*a*), *for* "Coke, 4 Just. 2" *read* "Coke, 4 Inst. 2."

Page 17, line 7, *for* "Edward I." *read* "Edward III."

Page 20, note (*a*), add:—In 1801 the Houses of Parliament agreed that the general statutes, and the "public local and personal" Acts of Parliament in each session should be classed in separate volumes. (See Richards *v.* Easto, 15 Meeson and Welsby's Reports, 244.)

Page 21, line 5, *for* "33 Geo. III. s. 13" *read* "33 Geo. III. c. 13."

Page 34, note (*a*), *for* "Geo. I. st. 2, c. 38" *read* "1 Geo. I. st. 2, c. 38."

Page 39, note (*c*), *for* "1 Will. & M. sess. 1, c. 2" *read* "1 Will. & M. sess. 1, c. 5."

Page 39, note (*d*), *for* "1 Will. & M. sess. 2, c. 2" *re d* "1 Will. & M. sess. 1, c. 5."

Page 63, note (*e*), *for* "13 Charles II. stat. 2, c. 2" *read* "13 Charles II. stat. 1, c. 2."

Page 102, note (*a*), *for* "disfranchised 14 & 15 Vict. c. 106" *read* "disfranchised by 15 & 16 Vict. c. 9, in consequence of the Report of Commissioners appointed under 14 & 15 Vict. c. 106."

Page 118, line 14 from the bottom, *for* 2 to 1664" *read* "quarto, 1664."

Page 119, line 18, *for* "7 & 8 Will. III. c. 3" *read* "7 & 8 Will. III. c. 7."

Page 220, note (*a*), *for* "Judicial" *read* "Juridical."

Page 227, note (*b*), *for* "1 Edw. II. c. 2" *read* "1 Edw. III. c. 2."

Page 231, note (*a*), *for* "21 Ric. II. c. 2" *read* "21 Ric. II. c. 12."

Page 244, note (*a*), add "In the reign of Henry V. every Act of the Council, of which there are many still extant, was written on a separate paper, and signed by all the Members present, except the officers. Those documents were afterwards copied into the general Register, or Book of the Council." (See 2 Proceedings of Privy Council, xxvi.)

Page 284, note (*e*), and the corresponding sentence in the text, *for* "James I." *read* "James II."

Page 301, line 6, *for* "Even to this day the writ of error in Parliament commands" *read* "Until the recent abolition of the writ of error in Parliament (as hereafter mentioned), that writ commanded."

Page 308, note (*c*), cancel the words "probably not earlier than the time of the Tudors."

Page 338, line 2, after the words "transferred it to the Crown" add "so far as related to the appointment of justices of Eyre, justices of assize, justices of the peace, and justices of gaol delivery; except that the authority of the Bishops of Durham and their temporal chancellors, as justices of the peace, was retained."

Page 353, note (*c*), *for* "16 & 17 Vict. c. 76, s. 110" *read* "15 & 16 Vict. c. 76, s. 110."

Page 373, note (*c*), *for* "juridiciales" *read* "judiciales."

Page 405, note (*b*), *for* "Hen. VII. c. 12" *read* "11 Hen. VII. c. 12."

Page 488. To the notes of the history of the judicature of the Privy Council, the following may be added:—"In 33 Edward I. the King appointed certain persons to receive the petitions of all those who wished to deliver their petitions to that Parliament. Afterwards the King appointed certain persons to answer all petitions from the people of Gascony, which could be answered without the King (*qe poeynt estre reportduz saunz le Roy*), and others to answer all petitions from Guernsey, which they could answer without the King. The petitions were accordingly delivered by the persons appointed to receive them to the persons appointed to hear them. (1 Rotuli Parliamentorum, 159.) There is a long list of references to records concerning the jurisdiction of the Channel Islands in Prynne's 'Brief Animadversions on the Fourth Part of Coke's Institutes,' p. 205."

Page 542, note (*a*), *for* "Towns Police Clauses" *read* "Towns Improvo-provement Clauses."

Page 552, note (*e*), *for* "11 & 12 Vict. c. 76" *read* "11 & 12 Vict. c. 78."

Page 593, note (*c*), *for* "the statute of Westminster the Second, c. 29" *read* "the statute of Westminster the Second, c. 39."

Page 593, note (*d*), *for* "abolished by statute 12 Ric. II." *read* "abolished by statute 9 Edw. II. st. 2; and the appointment of sheriffs was further regulated by 12 Ric. c. 2."

Page 603, line 14 from the bottom, *for* "1 Will. & M. sess. 2, c. 1" *read* "I Will. & M. sess. 2, c. 2."

Page 610, line 5, *for* "(*b*)" *read* "(*a*);" line 27, *for* "(*a*)" *read* "(*b*)."

Page 615, line 12 from the bottom, *for* "27 Hen. c. 24" *read* "27 Hen. VIII. c. 24."

Page 634, line 22, *for* "would either free themselves" *read* "would free themselves."

Page 664, line 10 from the bottom, *for* "the other's" *read* "each other's."

Page 670, line 2 from the bottom, *for* "in" *read* "on."

Page 691, line 6, *for* "1 Will. IV. c. 15" *read* "4 Will. IV. c. 15."

ANALYSIS

OF THE FOLLOWING WORK.

As the following treatise has been arranged upon a systematic plan, a brief analysis of it will serve to explain its general design, and to show the connection of its several parts with each other.

Book I. Legislature. Ch. I. Divisions of Government.

The treatise is divided into three books, relating to Legislation, Judicature, and Administration respectively. Constitutional government necessarily consists of these three parts: the Legislature, which has the supreme power of making laws; the Judicature, which has the supreme power of interpreting laws; and the Administration, which has the supreme power of executing laws, so far as their execution does not require authority to interpret them. It is shown in the commencement of the First Book that these three bodies in the State are, in the English Constitution, to a specified extent, kept separate; and authorities are cited in support of the proposition that in order to secure the fulfilment of the purposes for which they are established, each of them ought, in the exercise of its own special functions, to be independent of the rest, and supreme.

Book I. Ch. II. The Authority of Parliament.

The supreme legislative power is vested in Parliament, and the operation of Acts of Parliament, so far as they express the manifest intention of the Legislature, is not subject to the control of any other authority in the State. But the Constitution has given to the Judicature power to interpret statutes whenever they are ambiguous, and, according to Lord Coke, to control and adjudge

void statutory provisions which are repugnant, or impossible to be performed. The legislative power of Parliament is subject to some further restrictions, such as those which relate to the Acts of Union with Scotland and Ireland, and the taxation of the Colonies. Parliament also delegates a considerable part of its power. Thus, a large part of the law is founded, not on statutes, but on judicial decisions; and another part on Royal proclamations. Lastly, international rights, founded on the mutual agreement of nations, are not abrogated by Acts of Parliament.

Book I. Ch. III. The Origin of Parliament.

It is scarcely possible, without some reference to the ancient history of Parliament, to give a clear account of its present constitution. The results of the latest investigations of the origin of Parliament concur with the earlier authorities in showing that the Norman Sovereigns of this country recognized the right of the tenants-in-chief of the Crown to assemble in order to grant aids to the Crown; and that the origin of the representation of the Commons was the impossibility of assembling these tenants all together. In 49 Hen. III. a Parliament was held, composed of lords spiritual and temporal, and representatives of shires and boroughs, and this is the earliest such Parliament of which clear evidence has been preserved. From that time the power of the representatives of the Commons gradually increased. The principle soon became settled, that taxes were not to be imposed without their concurrence, and early in the fourteenth century the right of assent in the Commons to the making of laws in Parliament had become generally established.

Book I. Ch. IV. The Acts of Parliament.

After the legislative power of the two Houses of Parliament became established, they did not immediately acquire the power of directly enacting laws. The statutes were founded on petitions in Parliament, and the answers of the Crown to them; from these together the statutes were subsequently drawn up by the judges. This practice gave occasions of misinterpreting the intention of the Legislature; but in the reign of Henry V. the Commons obtained from the Crown the concession that nothing

should be enacted without their consent, and about the same time the practice became settled of passing bills in Parliament in a complete form, and then submitting them to be accepted or rejected, but not to be modified by the Crown.

Acts of Parliament are divided into two principal classes—public and private. The latter are distinguished from the former, not only by the limited nature of their objects, but also by the manner of passing them, and chiefly by the Parliamentary practice of allowing persons whose interests are affected by private Bills to appear and support or oppose them.

The Sovereign has a limited power, apart from the two Houses of Parliament, to make or suspend laws. The constitutional struggle against excesses of this power was principally carried on in the time of the Stuart dynasty, and was the occasion of repeated remonstrances by Parliament against illegal proclamations. These proclamations were enforced by illegal judgments in the Star Chamber, until its dissolution in the reign of Charles I., but were continued during the whole period of the Stuart dynasty. The general indignation against the unwarrantable exercise of the dispensing power by James II., led to the enactment in the Bill of Rights after the Revolution, prohibiting all dispensations with statutes without the authority of Parliament. In modern times, however, Orders in Council have been issued in cases of unforeseen emergency, temporarily suspending certain statutes relating to commerce and finance. The course of Parliament, in subsequently indemnifying the advisers of the Crown who had taken upon themselves the responsibility of such Orders, recognizes the principle that there are cases of emergency in which the Crown may properly anticipate the future action of Parliament by a temporary suspension of certain classes of statutes.

In many modern statutes the manner and circumstances in which they are to be put in force are expressly left by the Legislature to the discretion of the Sovereign in Council.

The legislative power of the Crown with respect to the Colonies differs materially from the power of the Crown in domestic

legislation. With respect to those colonies which have been acquired by cession or conquest, the legislative power of the Crown is absolute, and is sufficient for the establishment of local legislatures.

Book I. Ch. VI. The Parliamentary Powers of the Crown.

No Parliament can be legally assembled without the authority of the Crown. The importance of this rule is demonstrated by the rarity of the instances in which it has been broken, and the carefulness with which Parliament has sought to remedy the infractions. The only lawful exception to the rule is merely apparent, and provides for the re-assembling, on the demise of the Crown, of the Parliament then or previously in existence.

The frequency of sittings of Parliament, and their duration, have been subject to many fluctuations during its history, and are now regulated partly by statutes, and partly by the modern Parliamentary practice of annually renewing the grants of supplies, and the establishment of the standing army.

The manner of summoning Parliament is by writs issued out of Chancery, in pursuance of Orders of the Queen in Council. The law effectually provides against partial or sudden summons of Parliament; but enables the Crown to shorten the ordinary period of notice in various emergencies.

Parliament is opened by Royal authority; but the Crown has no further powers with respect to the initiation of proceedings in Parliament, except that with respect to certain Bills peculiarly affecting the Crown, its preliminary sanction is required. This rule especially applies to Bills of Supply.

Parliament has from a very early period shown extreme jealousy of Royal interference with its proceedings and freedom of debate; and has accordingly secured its privileges, and the security of its members in this respect, after many momentous contests with the regal power.

The right of the Crown to give or withhold assent to every bill in Parliament has never been disputed while a kingly government has subsisted. For sound constitutional reasons, the Sovereign is required to express a distinct assent to, or dissent

from, every bill passed in Parliament; and the Crown cannot by anticipation delegate authority to give the Royal assent to bills before they are passed or without specifying them. The assent must be a real expression of the Royal will. A remarkable exception, however, to this rule occurred with respect to the Regency Bill of 1811, to which the Royal assent was given by commission, during the mental incapacity of George III.

The prorogation or dissolution of Parliament may be effected at any time by the Royal prerogative. This prerogative has been demonstrated by various authorities to be necessary to preserve that separation of the executive and legislative power which has been shown to be essential to constitutional government. The dissolution of Parliament is either by effluxion of time or by the Royal will. Formerly, the Royal will in the latter case was exercised arbitrarily, but is now regulated by settled principles.

The Lords Spiritual and Temporal constitute, for all purposes, a single House of Parliament. The former, in ancient Parliaments, exceeded the latter in number, and included bishops, abbots, and other ecclesiastics, who were summoned, not in respect of their offices, but of their baronial tenures. The Lords Spiritual in Parliament are now the archbishops, and twenty-four bishops of England, and four of the Irish bishops who sit by a certain rotation.

The *Lords Temporal* also sat in Parliament formerly in respect of their baronies; but in the time of Richard II. the practice began of conferring peerages by letters-patent, irrespective of tenure, and peerage has now long ceased to be annexed to the possession of land. The dignity is inheritable, according to the limitations created by the Crown; but it appears to have been recently settled that the Crown cannot limit the dignity to a man for his life.

The Lords are entitled to their summons to Parliament *ex debito justitiæ*, and many instances have occurred in which the House of Lords has interfered to prevent the summons from being unjustly withheld. Disputed claims of peerage are referred

by the Crown to the House of Lords, and are there judicially investigated.

The number of Peers summoned to Parliament has, since its regular constitution, varied greatly. The power of the Crown of adding to the number of Peers is absolute, and is shown by various authorities to be a necessary constitutional check on the power of that body. The effect of its constitution as a separate branch of the Legislature is considered with reference to the doctrine of the "balance of power" of Parliament,—a doctrine which, though it has been impugned by some modern writers, appears to be sufficiently established by authority, and especially by reference to historical precedents. A review of these precedents, many of them of a remarkable character, throws much light upon the relations of the Houses of Parliament to each other and the Crown, and shows that the House of Lords has repeatedly interfered to maintain the constitutional authority of the Commons against the Crown on the one hand, and, on the other hand, to restrain the House of Commons from exceeding its constitutional authority.

Book I. Ch. VIII. The Constitution of the House of Commons.

The representative system depends on two rights—the *franchise*, or local right of representation, and the *suffrage*, or personal right of voting. Both these rights have undergone remarkable vicissitudes in the history of the Constitution. In counties, indeed, the representative system has always been comparatively regular; the county franchise being distributed according to fixed rules established in England by custom, and in the other parts of the kingdom by statute. The ancient right of county suffrage in England also was uniform, being confined to the persons commonly designated forty-shilling freeholders. The chief irregularities of the electoral system before the Reform Acts were in cities and boroughs, where the representation depended on a multitude of accidents, such as the caprice of sheriffs, or the exemption of boroughs from the expense of maintaining representatives in early times; and in later times, charters renewing the franchises of boroughs; and other accidents. The quali-

fications of borough voters were, from similar causes, extremely irregular.

The result was, that previously to the "Reform Acts" the electoral system had fallen into great confusion, and a large part of the members of the House of Commons were elected by the influence of a few powerful patrons, or procured their places by almost open purchase. The objects of the "Reform Acts," so far as related to the distribution of the franchise and the suffrage, were to remove the greatest irregularities existing as to the former; and with respect to the latter, to enlarge the constituencies by creating various new qualifications of voters. The nature of these changes, the extent of the irregularities still subsisting, and the efforts which have been made in later times to correct them, are fully referred to in the text.

Hardly less important than the changes just mentioned are those introduced by the "Reform Acts" and subsequent statutes, in the *practice* and *procedure* with respect to the constitution of the House of Commons. The principle was introduced by the Reform Acts that no person can be a voter unless his name be duly *registered*, and provisions are made for collecting the names of all persons claiming the right of suffrage, and for revising the lists of such claims. The mode of conducting elections depends partly on ancient laws, in which are seen traces of the original feudal constitution of Parliament, and partly on material modern changes in the details of elections, which have been found to conduce greatly to their order and regularity.

The laws relating to *bribery and corrupt practices* at elections, depend now almost entirely upon modern statutes, which define those offences, their consequences, and the modes of investigating them. The judicature of controverted elections belonged, until the reign of Henry VII., to the kings and their councils; but subsequently the House of Commons assumed this jurisdiction, and they have retained it with a tenacity which appears in several remarkable contests with the Crown and the Lords. The trial of controverted elections in the House of Commons was formerly subject to gross abuses and partiality. The modern system

of judicature, which has only partially remedied these abuses, is, on account of its constitutional importance, fully described.

The most important laws relating to the *qualifications* of members of the House of Commons, are now those which relate to the exclusion or vacation of the seats of *placemen*. The history of these laws illustrates one of those many struggles of the House of Commons for its independence which demand the attention of the student of the English Constitution.

The last branch of the subject of the constitution of the House of Commons relates to the *Speaker* of that House. The Commons, unlike the Lords in that respect, have secured to themselves—not, however, without a contest with the Crown—the nomination of their Speaker, and have strictly defined his powers and duties so as to secure his independence of the Crown.

Book I. Ch. IX. Procedure in Parliament.

The *Rules of Procedure* in Parliament sitting in its legislative capacity are necessarily multifarious, and it is obviously inexpedient to advert in this treatise to minute regulations which involve no constitutional principle. Among the rules of Parliamentary sittings and debates which are of the greatest constitutional importance, are those which, by a modern innovation, have the effect of devoting a large part of the time of the Houses of Parliament to "Government measures"—that is, measures proposed by ministers of the Crown. There are, however, several others of these rules which possess considerable historical interest, particularly those respecting the rights of voting by proxy, and of recording protests in the House of Lords, and the publication of proceedings of the two Houses.

Communications between the estates constituting Parliament are those between the Crown and either House, and those between the two Houses. The laws regulating the two classes of communications show the solicitude with which the two Houses have maintained their independence of the Crown, and of each other. The rules of conferences depend mainly on ancient precedents, and are admirably contrived for the purpose of adjusting differences between the two Houses without unnecessary intercourse or

debate between them. It is only after a first and second conference, at which written instructions are delivered, that a "free" conference is resorted to, at which oral debate is allowed.

The Houses have, from early times, been accustomed to delegate part of their duties to *Committees*. "Grand Committees," or Committees of the whole House, were, in the time of the Stuarts, powerful instruments of investigating political abuses, and were regarded by the Crown with great disfavour. Several of these grand committees were, and long continued to be, appointed regularly every session; but sessional committees of the whole House have now fallen into disuse, except those of Supply and Ways and Means. Other committees of the whole House are now appointed merely as occasions require, and most frequently for the consideration in detail of the clauses of bills of which the general principles have been already affirmed by the House. The remaining committees are *Select* Committees, of which the greater number are appointed to investigate controverted elections, and applications to Parliament for private bills. Other select committees are also occasionally appointed on matters of public interest—for instance, inquiries into the operation of particular laws, and proposals for their amendment.

The greatest part of the Parliamentary grants to the Crown for the public service consists of *supplies* granted periodically by Parliament. These supplies were, in ancient times, granted by the Lords, the Clergy, and the Commons, each for themselves separately. Towards the end of the fourteenth century, it became the practice of the Lords and Commons to settle the amount of their grants by mutual consultation. The practice of originating supplies in the House of Commons exclusively, though common, was not universal in the time of the Tudors; and the amendment of money-bills by the Lords was occasionally practised still later. From the latter part of the reign of Charles II., the Commons have uniformly resisted such amendments. The Lords have, however, always retained the power of absolutely rejecting money-bills, though the House of Commons has recently resolved that it regards the exercise of that power with "peculiar jealousy."

The complicated subject of modern fiscal legislation is divisible into three branches: Supply,—Ways and Means,—and Money Bills.

The expenditure of the Central Government (excepting a part of the expenditure which is by various statutes rendered permanent) comes under the annual consideration of the House of Commons in the *Committee of Supply*. This committee takes into consideration the estimates of the expenditure of the current year, which are laid before the House of Commons by the direction of the Crown, and considers the sums to be voted for such services. This committee also, from time to time during the sessions, to meet the current expenses of the government, votes supplies of credit, which are taken into account when the final grant of the session is made, and with it constitute the total sum granted.

It is the distinct office of the Committee of *Ways and Means* to provide the means of raising the sums granted by the Committee of Supply. The ordinary Ways and Means are taxes and duties, and also Exchequer Bills. The latter, however, are not real sources of revenue, but merely temporary loans, which enable the Government to anticipate the growing produce of the taxes.

The general scheme of the Government for balancing Supplies and Ways and Means is explained by the Chancellor of the Exchequer in his Annual Budget.

The resolutions of the two Committees just mentioned are carried out by *Money Bills*. These are Bills of Supply, Tax Bills, and Bills of Appropriation. The nature of the first and second kinds of bills partly appears by their names and the foregoing explanation. Appropriation Bills are bills of great constitutional importance, which, though not without early precedents, did not become established as a regular part of financial legislation till the Revolution of 1688. By these bills, the particular sums granted for each service are directed to be appropriated to it exclusively. The mode in which the observance of this direction is secured is fully considered in a subsequent chapter on Fiscal Administrative Offices.

The last branch of our inquiry into the procedure of Parliament

relates to its *summary jurisdiction*, or the independent powers which each House possesses of vindicating its own authority and privileges. The jurisdiction of the Houses of Parliament to punish breaches of privilege, like every other jurisdiction not regulated by the ordinary rules of law, has been the frequent object of popular jealousy. This jurisdiction does not appear to have existed before the time of Henry VIII., and though at first exercised for the legitimate purpose of protecting the privileges of Parliament, was, after a time, extravagantly extended. James I. sensibly reminded the House of Commons in a notorious case, that they had no power "to sentence one who is no member nor offender against the House, nor any of its members." In the reign of Charles I., and again, after the Revolution, the House of Commons ordered illegal arrests of many persons simply for signing petitions which were distasteful to the majority of the House. In the seventeenth and eighteenth centuries, the pretensions of privilege were carried to an extravagant pitch, and the Houses of Parliament assumed a power to punish as breaches of privilege mere invasions of civil rights of their members, such as trespasses on their lands.

It is clear that if no remedy had existed for these abuses, the Houses of Parliament would have become Courts of Judicature to determine the civil rights of their members. Constant efforts have been made almost from the time when Parliamentary arrests began, to bring them under the cognizance of the Courts of Law. But these courts generally refused to give any *direct* decision as to the extent to which the jurisdiction could be lawfully exercised. In later times, however, the judges, secure in their independence, grew bolder to examine the power of the Houses of Parliament; and modern cases have established the important constitutional principle that the Houses of Parliament, like all other powers in the kingdom, are subject to law; and that courts of law will release from arrest a person who has been committed by either House for a specified cause which is manifestly not a breach of privilege.

The origin of the Privy Council is usually referred to the *Con-* Book 1.

CH. X. The Privy Council and Cabinet Council.

cilium privatum et assiduum—the Council regularly attendant on the King, which in Norman times had a large share of the legislative, as well as the executive, business of the country. The right of the Privy Council to participate in making laws in Parliament appears to have continued until about the time of Edward III.

One of the most important parts of constitutional history is that which relates to the control exercised by Parliament over the advisers of the Crown. On many momentous occasions, even before the constitution of two Houses of Parliament, this control was exercised by the great Council of the nation; in some cases demanding the punishment and dismissal of evil counsellors, in other cases demanding that the Crown should be surrounded by approved advisers. At the end of the fourteenth century, the Commons began to take upon themselves the office of accusers of great ministers of State at the Bar of the House of Lords. This salutary method of Parliamentary impeachment continued in practice until the advent of the Tudor dynasty, when it was suspended. During that period the Privy Council obtained an enormous accession of power, principally by means of the Star Chamber. Instead of the regular and wholesome method of Parliamentary impeachments, Bills of Attainder were substituted, and were often the means of condemning fallen Royal favourites by Acts of Parliament, without regular trial.

Under the Stuart dynasty the method of Parliamentary impeachment was revived. In the reign of Charles I. Parliament proceeded still further in its claims of control over the Privy Council, and demanded that the advisers of the Crown should be chosen subject to its approval, and that the authority of the King in Council should be exercised by the majority of the Council. This plan, if it had been executed, would have almost entirely nullified the separation of the Executive and Legislative Government.

To the same time is to be referred the origin of *Cabinet Councils*, consisting of those members of the Privy Council who are the more intimate advisers of the Crown. After the Restoration, an attempt was made to remodel the Privy Council by composing

it partly of great officers of State, and partly of members of the Houses of Parliament representing different political parties; but the scheme was soon found impracticable.

The present system of *political union* among the advisers of the Crown was not established until long after the Revolution. In the reigns of William III. and Anne, the ministries were frequently composed of persons of opposite politics, and changes were made among them gradually, and not simultaneously. George I., indeed, changed the whole ministry on his accession, but his motive was personal feeling, and not deference to Parliament. In the latter part of his reign he was compelled by the influence of a dominant party to accept Sir Robert Walpole as his prime minister. The career of Walpole illustrates two remarkable principles of modern government. In the first place, he inaugurated the modern system of political union among the ministers of the Crown; in the second place, the abandonment of his impeachment, which, after the majority of Parliament turned against him, had been projected by the House of Commons, marks the discontinuance of the old system of party impeachments, and the substitution of the modern system of Parliamentary control over ministers, exercised by compelling their resignation.

The first two Hanoverian Kings were compelled to accept ministers who were supported by the influence of a few powerful families. George III. opposed this system, and for the first twenty years of his reign contrived to be in a great measure independent of his ministers, whose Parliamentary measures he continually thwarted. Pitt was his first minister, who successfully insisted that the King's political conduct should be regulated by no advisers but his public ministers. In 1784 Pitt established a remarkable precedent in the relations of the ministers of the Crown to Parliament. His was the first instance, after the establishment of the modern system of party governments, of a minister of the Crown who, finding the majority of the House of Commons opposed to him, sought by means of a dissolution of Parliament to procure a majority in the House of Commons favourable to his measures.

The system of political union among the ministers of the Crown, which was discontinued after the fall of Walpole, was revived by Pitt. After his death the system was generally observed; but so late as 1812, Lord Wellesley, by the command of the Regent, made an offer to the Whig Lords so to compose the Cabinet as to give them a majority of one in it. In more modern times, however, the rule has been that the ministers remain together in office only so long as there is no public conflict between them as to their political sentiments.

Book I. Ch. XI. The Rights of Petition, Public Meetings, and the Press.

Public opinion is so generally recognized as a power of the British Government, that an inquiry respecting its Legislature would be incomplete without a consideration of the Rights of Petition, Public Meetings, and the Press—the three means of expressing public opinion.

The practice of *petitioning* Parliament for the redress of *public* grievances was not common before the time of Charles I., when multitudes of petitions were presented to the Long Parliament; but were commonly received with censure when the petitioners' sentiments were opposed to those of the majority in Parliament. In the reign of Charles II. the rights of petition were recognized by a statute, which, however, restrained tumultuous petitioning. In the latter part of the same reign the House of Commons attempted illegally to restrain the presentation of obnoxious petitions to the Crown. The next serious attempt against the rights of petition was the prosecution of seven bishops, in the reign of James II., for an alleged libel in a petition presented by them to the King. The Bill of Rights declared that this prosecution was subversive of liberty, and affirmed the general right of subjects to petition the Crown. The right of petition was, however, grossly violated by the House of Commons in 1701, by the imprisonment of various persons who had legitimately exercised the right. But all restrictions upon its free exercise are now practically obsolete.

The laws relating to *political meetings, associations, and speeches,* were formerly terrible engines of State oppression, but

are now rarely enforced. One of the most important parts of this subject is the history of the general law that bare words, however seditious, are not treason. This humane law has been at various times suspended by Acts of Parliament, which arbitrary governments have used as deadly weapons against their enemies. The Government of Henry VIII. is conspicuous for cruelties exercised under such statutes, which stain the early annals of the Reformation; and Mary, to her honour, renewed the old law that bare words are not treason. This law has been several times since temporarily suspended, and the last attempt to abrogate it was unsuccessfully made in the reign of James II.

Closely connected with this subject is the law of treason as it affects political meetings. By a legal construction of the Statute of Treasons, the assembly of persons for general political objects, accompanied by a display of force, was deemed to constitute a constructive levying of war against the King. It is, however, now well established that a peaceable political assembly, however numerous, cannot be brought within the operation of this branch of the law. Neither is the mere assembly of any number of persons for political purposes, of itself in any manner illegal; neither is the mere exhibition of the physical force of such meetings, where there is nothing to show that the force is threatened to be exercised in a specific manner. But an agreement to convoke a political meeting for a specific purpose of intimidation, as to intimidate the Houses of Parliament, is indictable as a conspiracy.

The history of restraints of the freedom of the *Press* in England commences with the laws against heretical books in the reign of Henry IV., and continues to the beginning of the present century. In the times of the Tudors and the Stuarts, until the fall of the Star Chamber, that Court had for a principal part of its jurisdiction the licensing of books and the control of the Press, and exercised its power in a fearfully despotic manner. During the Interregnum the censorship of the Press continued, and the Houses of Parliament incessantly exercised their summary jurisdiction to punish obnoxious authors and printers.

After the dissolution of the Star Chamber, the restraints of

the Press were of three kinds:—1, the laws prohibiting the publication of books without previous licence; 2, the practice of Parliament of treating obnoxious publications as breaches of privilege; 3, prosecutions at law for libel. The licensing system expired a few years after the Revolution, but the other two kinds of restraint were practised much later. There were repeated instances during the last and a part of the present century of Parliamentary proceedings against authors and publishers of writings deemed breaches of privilege. With respect to the third class of restraints—prosecutions for libel—these were not brought into the Common Law Courts until, by the abolition of the Star Chamber, the Government lost its means of conducting such prosecutions without the intervention of juries. The power of juries in libel cases was, however, comparatively ineffectual to protect the Press, until the passing of Mr. Fox's Libel Act in 1792. Previously to that enactment, it was held that a jury could inquire only into the fact of publication of an illegal seditious libel, and as to what persons and things it was intended to apply to; the seditious tendency of the libel was a question of law determinable by the judges only. By Fox's Act, however, the jury were empowered to give a verdict upon the whole matter at issue. That law was not followed by the disastrous consequences which its opponents anticipated. It has been found that licentiousness of the Press is far more effectually restrained by the control of juries, and therefore of public opinion, than by the ancient terrors of State prosecutions.

Book II. JUDICATURE. CH. I. Divisions of the Judicature.

The subject of English JUDICATURE is too extensive and complicated to admit of a complete exposition of it in this work, which is concerned principally with the constitutional aspects of the subject. With this object in view, it has been thought desirable, before entering into a description of the several courts of justice, to inquire into their origin, the general nature of judicial offices, the general course of procedure in courts of justice, and the means by which the authority of the law is maintained.

The establishment of all judicature depends upon those necessary divisions of constitutional government which have been insisted upon at the commencement of this work, and upon the principle there established, that in order to maintain the laws there must be a recognized authority, independent of the Legislature and Administrative Government, for the interpretation of the laws. In England, the authority to interpret laws is, with a very few unimportant exceptions, given to established courts of justice exclusively.

The authority of all these courts is dependent on the constitutional principle that the Sovereign is the fountain of justice,—a principle which, as it has been limited and developed in this country, has tended greatly to maintain the efficiency and independence of the judicature.

The administration of justice in Saxon times was essentially local, rising from the smaller jurisdiction gradually to the higher. This system was in a great degree subverted at the Conquest, when the local jurisdictions were stripped of a large part of their power, and the principal jurisdiction, both civil and criminal, was centred in one great tribunal, the *Aula Regia*. But a gradual decentralization commenced soon after. Itinerant judges were established in the reign of Henry II., to hold pleas, both civil and criminal, throughout the kingdom periodically; and a further important change, made by Magna Charta, was the establishment of a fixed court for the determination of "common pleas," or causes between private persons, distinct from the judicature of pleas of the Crown.

The most important epoch, however, in judicial history, is that of the first three Edwards. Of the reign of Edward I., it has been said that more was then done to establish the distribution of justice throughout the kingdom than in all ages since that time. From a review of the changes in the judicature in his reign and the two succeeding, it appears that all the principal parts of our present judicial system were then established, and that the fundamental divisions of the judicature of the three Superior Courts of Law, of the Courts of Assize, of the Court of Appeal

in the House of Lords, of the Court of Chancery, of the Ecclesiastical Courts, and of the local Courts, including those of Justices of the Peace, were then settled nearly as they exist at present.

Our inquiry into the origin of the courts of justice would be imperfect without some reference to the *origin of the laws* administered in them, and to the remarkable tenacity with which the English people and Parliament adhered to the system of common law, and resisted the introduction of the civil and ecclesiastical laws. In this contest the common law was, in the main, victorious. But the rival systems of jurisprudence also became partially established. The Court of Chancery obtained a settled jurisdiction, in which some of the principles of Roman law were combined with the common English law. The Ecclesiastical Courts obtained jurisdiction (jealously limited however), in which the canonical and civil laws were allowed. In like manner the Martial Courts and Admiralty Courts, and one or two local jurisdictions, were regarded as having authority over persons and things properly excepted from the operation of the common law. But these exceptional jurisdictions were all established either primarily by the expressed, or ultimately by the implied, recognition of the Legislature; and the result of the contest just mentioned was the settlement of the general principle that, though the King might erect new courts, he could not, of his sole authority, give them jurisdictions inconsistent with the ordinary course of law.

Book II. Ch. III. Judicial Offices.

The judicial offices into which we have to inquire are those of—1. Judges. 2. Juries. 3. Counsel and Attorneys. 4. Subordinate officers of Courts of Justice.

1. *Judges.*—In all courts of justice, the direct determination of questions of law is entrusted to the judges. In the Courts which administer the common law usually, and in some other courts occasionally, the trial of issues of fact is by jury. There is no difficulty in applying this rule in cases where the issues of fact and of law are completely separable; but where the two kinds of issues are necessarily mixed, an incidental duty devolves upon juries of determining questions of law, and in the exercise of this

incidental duty they are directed by the judges, and usually defer to their opinions.

A large part of the law of England is inferred from *judicial decisions*. This judge-made law is no less obligatory than the statute-law, though, of course, always liable to be altered by it. Judicial law, if it depended merely on the discretion of individual judges, would necessarily be mutable and uncertain; but the law takes many precautions to secure certainty and uniformity in judicial decisions. In the first place, the judges are bound to decide by reference to precedents of former analogous cases. Secondly, almost every judicial decision of inferior courts of law and equity is liable to review in a single supreme court of appeal—the House of Lords. Thirdly, the decisions of the judges are not binding except when made judicially, that is, in causes determined by them in their courts of justice. Lastly, the decisions of the judges, and the reasons for them, are delivered publicly.

The judges of almost all courts of justice are appointed by the Crown—the exceptions being ecclesiastical and a few local courts. The independence of the superior judges of common law and equity (except the Lord Chancellor) is secured by rendering their offices tenable during good behaviour. Until the Revolution, they usually held their offices during the pleasure of the Crown; but the arbitrary displacement of judges does not appear to have been common before the time of the Stuarts. Under that dynasty, the abject servility of the judges to the Court was secured by incessant removals from the Bench of judges who retained any of its traditional independence. The law amply provides, on the one hand, for the protection of the superior and inferior judges in the upright discharge of their duties; and on the other, for the severe punishment of wilful abuse of their office.

2. *Juries.*—The method of trial by jury of issues of fact at common law did not come into regular use until some time after the Conquest, and was at first confined to civil causes.

Even after the use of juries for the trial of issues became established, their functions remained for a long time very different

from what they are at present. Anciently, the jury consisted partly or wholly of witnesses. Until the time of Henry VI. the functions of witnesses and jurors were combined, and it was not until some time afterwards that the separation between them became complete.

While the method of trial by jury became established in the common law courts, it made no corresponding progress in the courts which adopted the civil and canon laws. The introduction of trial by jury into those courts is only recent and partial.

There is hardly a branch of the law in which more jealous and incessant vigilance has been shown to guard against partiality than in the *constitution of juries*. Persons liable to be jurors are required to have certain property qualifications. The sheriff had formerly a large discretion in summoning juries; but this discretion is now taken away, and the sheriff is required to summon those persons only whose names are on the authentic lists of persons qualified to be jurors, which are annually revised by the justices of the peace. The old law provided that when the sheriff was related to either of the parties to a cause, or otherwise unindifferent, a substitute should return the jury to try the cause. The protection of the old law against the unindifferency of the sheriff is now held to be applicable with respect to those officers who have succeeded to his duties.

An additional provision against the improper selection of juries is the right of *challenge*, or objection to jurors—either to the whole panel, on account of partiality or some default of the sheriff or his officers, or to individual jurors, on the ground of their partiality or other disqualification. Moreover, on trials for felony and capital crimes, there is a limited right of peremptory challenge of jurors without cause assigned.

The modern system of selecting jurors is the result of gradual improvements, suggested from time to time by experience. The ancient history of the law is full of examples of abuses in the selection of juries. These abuses grew to an intolerable excess in the reign of Charles II., and were accompanied by a horrible prostitution of the judicature for political purposes. Soon after

the Revolution, one of the principal defects of the jury system was remedied by taking from the sheriff a large part of his discretionary power; and further improvements, of which the course is stated in the text, have at length rendered the packing of juries an obsolete evil.

The excellence of the system of trial by jury consists, not merely in the manner in which juries are constituted, but also in several other particulars. One of the most important of these is the separation of the functions of the jury from those of the witnesses, and the requiring the jury to found their verdict, not on any private knowledge of their own, but solely on the evidence produced before them.

The rule that the *verdict* must be unanimous, though ancient, is not coeval with the original institution of juries. The expediency of the rule has been greatly controverted, but the objections to it are much diminished by the modern system of discharging juries where they are found unable to agree as to their verdicts. Another admirable part of the jury system is the protection which the law gives to jurors in the conscientious discharge of their duties. An arbitrary practice grew up, first in the Star Chamber, and afterwards in the Law Courts, of punishing juries for giving uncourtly verdicts. In the reign of Charles II. this practice, like every other abuse of the judicature, reached its height, and was at length repressed by a judicial decision, of which the principal honour belongs to Lord Chief Justice Vaughan. The irresponsibility of juries for their verdicts, except in cases of wilful misconduct, has long been completely established.

Though the law pays the highest regard to verdicts, they are not absolutely irreversible. A person once acquitted upon a charge of felony cannot be tried again on the same charge; but in other cases the law sometimes allows a new trial, as where material evidence has been discovered since the trial, and in other cases of miscarriage of justice.

3. *Counsel and Attorneys.*—The persons allowed in this country to advocate the causes of others in the superior courts, are Barristers and Advocates. The former are appointed by the

Inns of Court, which constitute an ancient legal university which has existed from the time of Magna Charta. The Advocates, until recently, pleaded only in the Ecclesiastical and Admiralty Courts, and are, in the province of Canterbury, nominated by its Archbishop. The law of England, similarly to that of some other countries, makes a distinction between the functions of Counsel and Attorneys, assigning to the former exclusively the duty of advocating causes in the superior courts, and to the latter the management of the details of such causes. In order to encourage due freedom of speech, the law has conferred various immunities upon barristers. It was not, however, until after the Revolution that those immunities were completely established; before that time the defence of defendants in causes prosecuted by the Crown was often a service of danger; and the Star Chamber, in the height of its power, assumed authority to punish counsel who gave professional advice adverse to the prerogatives of the Crown.

4. *Subordinate Officers* of the Courts of Justice are of two kinds—those who discharge *judicial*, and those who discharge *ministerial* duties. The former are more important in the Court of Chancery than in common law courts, because the decrees and orders of the former are usually more complex than the judgments of the latter, and require a larger discretion to be delegated to the subordinate officers of the Court. The principal ministerial officer of all the superior courts is the Sheriff, who has large powers of executing their decrees and judgments against the persons and property of the parties against whom execution is directed in civil or criminal causes.

Book II. Ch. IV. Procedure in Courts of Justice generally.

The stages of a cause vary necessarily, according to its nature; but all causes have certain methods in common, the consideration of which will tend to elucidate the English system of administering justice.

In every litigated cause, no matter what may be its nature, there must be, if it proceed regularly, these constituent parts at least:—1. Summons of the Defendant. 2. Pleading, or state-

ment of the questions litigated. 3. Evidence, where facts have to be proved. 4. Argument of the cause. 5. Judgment. 6. Execution. Of these subjects those which are not considered in other parts of this book are discussed in the present chapter.

1. *Summons of the Defendant.*—The general principle of our law is, that no litigation can proceed until the defendant has been personally called upon to make his defence. In civil causes, both at law and equity, this rule is frequently relaxed where there is ground for believing that a defendant wilfully evades the summons, or (in equity) where his interest is sufficiently represented by other parties to the suit. In criminal proceedings the fundamental rule is that no man shall be condemned in his absence. Formerly, the process of *outlāwry*, by which the defendant was adjudicated to be out of the protection of the law, was often resorted to against absconding defendants; and the consequences, in criminal cases, amounted generally to a conviction of the offence charged. But such proceedings are now almost, if not entirely, obsolete. The only other case in which an accused person may be condemned in his absence is by Act of Parliament. Parliament has, however, rarely passed Bills of Attainder against persons unheard, except where their absence was wilful, and the few instances of a contrary course in Parliament have constantly been cited with obloquy.

2. *Pleadings.*—It is obviously essential to the satisfactory adjudication of every cause that the tribunal be, before hearing the cause, distinctly informed of the nature of the questions to be tried. The statements of these questions are technically called "pleadings." The systems of pleading in different courts differ materially, and yet present some remarkable analogies. The main difference is that between the system of courts which adopt the common law, and the system of courts which have adopted the methods of the civil or ecclesiastical laws. In the former, the parties are compelled, by a system of alternate statements, of which an outline is attempted in the text, to bring the questions between them to distinct issues of law or of fact. In the other courts, however—Chancery, the civil, ecclesiastical, and Scotch courts—

the pleadings are left *at large*,—that is, each party is at liberty to make his own statements, without separating the issues of law from those of fact, and the judge has to pick out the issues from those statements.

3. *Evidence.*—It is not within the scope of this work to examine the rules of evidence generally; but some of them require to be attended to on account of their constitutional importance. One of these is this,—that the burden of proof is generally on the party who maintains the affirmative of the issue. A necessary consequence of this rule, so far as it applies to criminal prosecutions, is stated in the maxim that the law presumes every man to be innocent till he be proved guilty. Another important rule is that every party to any cause may freely produce his witnesses and cross-examine his opponent's witnesses. In some cases, indeed, the rule requiring the witnesses to be produced for cross-examination is relaxed, where the relaxation is necessary, and obviously will not operate unjustly. The rules as to admissions and confessions differ fundamentally in civil and criminal causes. In criminal causes the accused is not only never judicially interrogated, but he is warned that he need not make any confession. In civil causes, on the contrary, each party is entitled to interrogate the other as to matters, within his cognizance, material to the cause. This process of enforcing discovery was formerly peculiar to the Court of Chancery and the courts which borrow principles from the civil law, but has been recently established in the common law courts.

Book II. Ch. V. The Supreme Power of the Law.

The object of the chapter relating to the supreme power of the law is, to give a general statement of the extent to which, and the means by which, every class of persons in England is subject to the laws. We have to consider,—firstly, the legal *responsibilities and immunities* of various persons and classes; secondly, the *methods* by which the supreme power of the law is secured.

Of persons having special immunities, the first to be considered is the Sovereign. As far as the ordinary courts of justice are concerned, it seems clear that their authority to execute justice

against the Crown is permissive only, and not compulsory. But while this seems clearly to have been the established doctrine of the courts of justice from their origin, it appears to be equally clear from history that Parliament has otherwise interpreted the maxim that the King can do no wrong. In feudal times, the Lords assumed a right to pronounce judgment against the King, and, in the name of the whole Parliament, to resign and redeliver to him their homage. In the case of Charles I. the House of Commons erected a tribunal for judging the King. In the case of James II. the Lords initiated, and the whole Parliament concurred in the appointment of a successor to the King upon his abdication.

For injuries proceeding from the Crown, and affecting rights of *property*, the law provides various remedies by Petition of Right, and analogous proceedings, by which a subject may obtain restitution of property unlawfully seized into the hands of the Crown.

The law allows to various classes of persons certain *exemptions from legal process*, but these exemptions (with perhaps one exception, in the case of peers and peeresses) are founded on considerations of public convenience. The exemptions are of two kinds: first, where persons in various offices are exempt from suits and actions brought against them on account of things done officially; secondly, where persons having public duties are protected from legal process, because it would impede them from discharging their duties. Of the first class, the principal instance is the immunity of judges and magistrates from suits and actions on account of things done by them judicially. This immunity is subject to two important limitations. In the first place, it applies only to *judicial*, and not to *ministerial* officers, and therefore does not exempt the governor of a colony or a sheriff from the legal consequences of his unlawful ministerial acts. In the second place, judges themselves are protected by this immunity only with respect to acts within their jurisdiction; from the consequences of acts done in excess of jurisdiction, they can claim no exemption. The full force of these

principles is best seen by reference to the cases in which they have been applied.

The second branch of the inquiry in this chapter is the consideration of the question—how, and by what *machinery*, has the law contrived to render the whole community amenable to its power? Of this question it is necessary here to consider that part only which relates to the effectiveness of the law to restrain great and powerful offenders, and especially to give redress for injuries committed by the Administrative Government.

It is hardly possible to understand the importance of the laws relating to the "Liberty of the Subject," without some reference to their history. The truth of this observation is remarkably shown by examination of an often-cited observation of Blackstone, that the public law attained a point of theoretical perfection in the course of the reign of Charles II., "though the years which immediately followed were times of great oppression." This observation, which, if well founded, would materially diminish the value of constitutional science, is controverted in the text; and it is shown that while Blackstone has referred to one or two improvements in the Constitution in the reign of Charles II., he has overlooked those defects then existing in the Constitution, which permitted the courts of justice to be converted into political tools. The portion of the history of the "Liberty of the Subject" which is most important to the student of the Constitution, commences with the latter end of the reign of Elizabeth, when the judges interfered, with considerable success, to check illegal commitments by the Privy Council. Under the following dynasty this resistance to the arbitrary power of the Crown was transferred from the judges to Parliament. The Houses of Parliament have rarely appeared before the nation with more dignity and honour than in the learned and laborious debates on the Liberty of the Subject, which led to the enactment of the Petition of Rights in the early part of the reign of Charles I. In the reign of George III. the duty of defending this liberty again devolved upon the judges, who, by a series of decisions, put an end to an illegal system of commitment by *general warrants* of

Secretaries of State, which grew up subsequently to the Restoration, and was carried to a great extent in the last century.

Of the means which the law has given of restraining unlawful commitments and imprisonments, the first here mentioned are indictments and actions of *false imprisonment*. The remedy by action of false imprisonment is especially important, because the Crown has no power to stop such actions. By means of them any private person may obtain compensation in damages for illegal arrest, or restraint of his person by any power or authority whatever. The most celebrated provision of English law against illegal arrest is the writ of *Habeas Corpus*, which has now superseded certain other ancient writs intended to secure the liberty of the subject. The provisions of the writ of Habeas Corpus require careful consideration, but its general purpose may be here explained to be, to bring before the judges prisoners alleged to be illegally in custody, in order that the judges may inquire into the cause of the custody, and if it be not shown to be legal, may release the prisoner either unconditionally, or upon his giving security to appear in answer to the charge against him. Another precaution of the law in favour of liberty is the process of *Gaol Delivery*, by which all prisoners committed for crimes are required to be kept only in authorized gaols, and to be tried and "delivered" by the judges periodically.

A second class of means of securing the effectiveness of the laws are the means adopted to compel tribunals to discharge their duties. These means are by writ of *Mandamus* issuing out of the Court of Queen's Bench to inferior courts, commanding them to proceed to judgment; and conversely by writs of *Prohibition* restraining inferior courts from taking cognizance of causes not properly within their jurisdiction. There were formerly many instances in which the Privy Council and the House of Lords received complaints of delays of English courts of justice, and ordered the judges to give redress; but that jurisdiction has long been obsolete.

The last topic of this chapter is the means of preventing powerful offenders from escaping from justice. Formerly the House of

Lords, in the exercise of that species of jurisdiction just mentioned, interposed to direct the course of trials where there was reason to apprehend the obstruction of justice by powerful influence. The Star Chamber assumed a similar jurisdiction, and one of the ancient foundations of jurisdiction in the Court of Chancery was where "one party was so great and rich, and the other so poor, that he could not otherwise have remedy." But all these irregular interferences with the ordinary course of justice have long been at an end.

Another ancient means of bringing powerful offenders to justice was by "*Appeal of Felony*," by which private persons could prosecute heinous crimes against themselves or their relatives, where the Crown refused to prosecute, and even where the Crown had already pardoned the crime.

These "appeals" are now abolished, but there still exist two important methods of commencing prosecutions of offenders where the prosecution is not commenced by the Crown. The first method is the *presentment* by a grand jury of offences from their own knowledge, upon which presentment an indictment is framed. The second method is *impeachment* by the House of Commons, by which a subject "guilty of such crimes as the ordinary magistrate either dare not or cannot punish," may be tried for them at the bar of the House of Lords.

Book II. Ch. VI. The Judicature of Parliament and the Lords.

Every proceeding of the House of Lords, as a court of separate judicature, is in law a proceeding before the King in Parliament. Judicature of Parliament and the Lords is now confined to these cases—proceedings upon bills of attainder, or of pains and penalties; trial upon impeachment by the House of Commons; trial of Peers indicted; and appellate jurisdiction.

The method of procedure upon bills of *attainder* and the like, has varied considerably from time to time, but the later cases have established the rule that in such proceedings the accusation must be established by evidence produced as in ordinary courts of justice, and that the accused is entitled to make full defence by counsel and witnesses.

The High Court of Parliament is the supreme court of the kingdom for the trial of great offenders, whether lords or commoners, by the method of *Parliamentary impeachment* by the House of Commons. This method has been most frequently employed for the prosecution of ministers of State and judges for misconduct in their offices. The proceedings in the House of Lords commence by the oral delivery of the charge of impeachment by a member of the House of Commons, by the command of that House. The Commons subsequently exhibit written articles of impeachment, to which the accused may plead or answer in writing; the pleadings upon impeachment being in some measure analogous to those at law. Upon the trial of an impeachment, managers, appointed by the Commons, open their case and adduce evidence; the counsel for the accused open their case, and adduce evidence; and the Commons reply. The Lord High Steward then puts the question to the Lords one by one, whether the person impeached is guilty, or not, of the several articles; and if the accused be found guilty by the majority of voices, and the Commons demand judgment, the Lords proceed to determine what sentence shall be passed.

This method of trial is closely analogous to the ancient *judicium parium* recognized by Magna Charta. The same observation applies to the trial in the House of Lords of *Peers indicted* of capital offences or felonies. In such cases, if Parliament be sitting, the indictment is removed into the House of Lords by *certiorari*, to be there tried. But if Parliament be not sitting when a Peer is so indicted, the Crown may, by commission, constitute the Court of the *Lord High Steward* for the trial of the indictment; upon which trial all Peers who have a right to sit and vote in Parliament are now required to be summoned. It is an observable distinction between trial by the Lords in Parliament, and trial in the Court of the Lord High Steward, that in the latter the Peers are judges of fact only, and the Lord High Steward is the sole judge on points of law. This Court, however, has never been summoned since the Revolution.

The House of Lords has a supreme *appellate jurisdiction*. The

principal part of this jurisdiction, appeals from the English and Irish *Courts of Equity*, is of comparatively recent origin. Such appeals were anciently heard upon commission from the Crown to certain lords to determine the cause; and it was not until the Long Parliament of Charles I. that the Lords ever heard appeals from Chancery without such reference from the Crown. The appellate jurisdiction was the subject of a furious contest between the two Houses of Parliament in 1675, but was at length acquiesced in by the Commons from unwillingness to entrust the appellate judicature to the Crown and its advisers. *Irish Equity appeals* were heard in the House of Lords about the same time, but were subsequently transferred by statute to the Irish House of Lords, and were re-transferred to the British House of Lords by the Treaty of Union with Ireland.

The appellate jurisdiction of the *Scotch Parliament* was likewise transferred to the British House of Lords by the effect of the Act of Union with Scotland. This jurisdiction was extended by the Act of 1815, which originated trial by jury in civil causes in Scotland, and gave an appeal to the House of Lords from decisions of the Scotch judges on points of law relative to such trials.

The most ancient branch of the appellate jurisdiction of the House of Lords is upon proceedings in "*error*" in judgments at common law. This, like the judicature of Equity appeals, was anciently given by warrant from the Crown, which was not dispensed with until the time of the Long Parliament of Charles I. Error in judgments of the Common Law Courts of England and Ireland lies in the Exchequer Chambers of the two countries respectively, and all judgments of those Exchequer Chambers are subject to review in the House of Lords. "Error" lies in matter of law only, and not in matters of fact, and may be brought in both civil and criminal causes. In the latter, however, a large part of the questions of law arising may be brought, by way of final appeal, before the "Court for Crown Cases Reserved," of which the constitution is explained in a subsequent chapter.

The House of Lords, sitting upon appeals, varies its characte

according to the place from which the appeal comes; if from a court of law, the House pronounces judgment as a court of law; and similarly upon appeals from the Equity Courts and Scotch Courts, is guided by the laws of those tribunals respectively.

The powers of the House of Lords as a court of appeal are virtually delegated to the *law lords*, that is, those Peers who hold, or have held, high judicial offices. The constitution of this tribunal has been frequently a subject of complaint by eminent lawyers, principally on account of the uncertainty and irregularity of the attendance of the law lords, whose attendance is not compulsory; and various proposals have been made for giving the Supreme Court of Appeal a more regular constitution than it at present possesses.

Book II. Ch. VII. The Judicature of the Privy Council.

Besides the House of Lords, there is another supreme tribunal of appeal, the *Queen in Council*, whose judicial functions are delegated to the *Judicial Committee* of the Privy Council. This committee has the important duty of reviewing judgments of Colonial courts throughout the British Empire, and of the Ecclesiastical and Admiralty Courts. The appellate jurisdiction of the Queen in Council appears to have been exercised from the earliest times of the British Constitution, and is now regulated by an Act of the reign of William IV., which constituted, and by subsequent Acts, which have improved the practice of the Judicial Committee of the Privy Council. This committee is composed of certain judges and other members of the Privy Council, nominated by the Crown, who review the judgments just mentioned upon reference from the Crown; and, after hearing, make a report or recommendation to the Crown, which is approved of by an order of the Queen in Council. The judgment accordingly is carried into execution by the governor of the colony, or court below.

Book II. Ch. VIII. The Court of Chancery.

One of the most peculiar features of the complicated system of English jurisprudence is the coexistence of two distinct codes of laws of property administered by distinct tribunals (the Courts of Law and Equity), and frequently affecting the same subject-

matter; so that the same property which a court of law would decide to belong to one man, a court of equity adjudicates to another.

The judicature of the Court of Chancery was, beyond doubt, originally suppletory to that of the courts of law; but as the two systems of judicature have grown up independently of each other, and have been subject to incessant changes, partly statutory and partly juridical, it is impossible to give any single definition of all the distinctions between them.

The two principal branches of the jurisdiction of Chancery are its *equitable* jurisdiction, which was originally granted by Royal prerogative without the sanction of Parliament; and its *statutory* jurisdiction, or that which is founded upon Acts of Parliament. The former branch may again be divided into two parts—equitable *rights*, or laws of property adopted by the Court of Chancery; and equitable *remedies*, or the methods which that court adopts for securing rights both legal and equitable.

1. Of *equitable rights* the most important are those which arise out of fiduciary relations. Trusts exist wherever a man has the legal dominion over property, and is at the same time subject to an obligation enforceable in equity, to apply it for the benefit of others. This separation of the legal ownership of property from its beneficial enjoyment was resorted to in feudal times, and subsequently, to evade feudal restrictions upon the alienation of property, the laws of mortmain, and forfeitures to the Crown for high treason. In modern times trusts are created for many useful purposes, for the benefit of persons incapable, for various reasons, of undertaking the management of their property, which is therefore confided to trustees for them.

The equitable rights enforced by the Court of Chancery are either expressly created by trusts, or are annexed to them by implication of equity, or are the consequences of fiduciary relations partaking of the nature of trusts.

2. *Equitable remedies* are of a more complex kind than legal remedies, and decrees in Chancery are usually more complex

than judgments at law, and require more extensive apparatus for carrying them out. The equitable remedies selected for description in the text, as illustrative of the variety and extent of the powers of the Court of Chancery, are—the taking of long and complicated *accounts*, as those required to be taken upon dissolutions of partnership, and many other cases; the *administration* of the estates of deceased persons by collecting their assets and distributing them among the persons entitled; the *cancellation* of illegal and fraudulent instruments, and instruments which are erroneous by mutual mistake; *contribution* among persons jointly liable to make some payment; *injunctions* to restrain threatened injuries, either by inequitable proceedings at law, or by tortious acts affecting property; *investment* and appropriation of the large funds of suitors in the custody of the Court; *partition* or division of estates among persons who are co-owners of them; the appointment of *receivers*, where required for the protection and management of property which is the subject of equitable claims; *sales* of property decreed to be sold for satisfaction of incumbrances, and in many other cases; *specific performance* of contracts, where money damages are an inadequate remedy for the breach of them, and the obligations ought to be judicially enforced in *specie*; *schemes of charities*, where the administration of them cannot be regulated in precise accordance with the original intention of the charitable donor.

The *statutory* jurisdiction conferred upon the Court of Chancery by various statutes, is a large and important addition to its original equitable jurisdiction, and is principally distinguished from it by a more summary mode of procedure. The equitable jurisdiction is exercised upon regular written pleadings (most usually bill and answer), which are described in an earlier chapter; whereas the statutory jurisdiction is generally exercised on *petitions*, without any other written pleadings. The statutory jurisdiction is of too multifarious a kind to admit of general description, except that it generally relates to trust property, or property of persons under various disabilities, and facilitates the management and application of such property.

The business of the Court of Chancery is now distributed as follows:—the original jurisdiction of Chancery proceedings is usually exercised by either the Master of the Rolls or one of the three Vice-Chancellors; the appellate jurisdiction is exercised by the Court of Appeal in Chancery, which consists of the Lord Chancellor and two Lords Justices.

Book II. Ch. IX. The Superior Courts of Common Law.

The three Superior Courts of Common Law, the Courts of the Queen's Bench, of the Common Pleas, and of the Exchequer, as originally constituted, were intended to have entirely distinct jurisdictions; but by various expedients the Queen's Bench and the Exchequer contrived to procure a large share of the jurisdiction which properly belonged to the Court of Common Pleas, and the jurisdictions of the three courts are now to a great extent alike. It will be convenient to state, first, the *exclusive jurisdictions* of each, and then the *concurrent jurisdiction* which they have in common.

The Queen's Bench is the only one of the three courts which has cognizance of criminal causes. It is the principal criminal court in the kingdom, and though criminal causes are for the most part tried in inferior tribunals, they may in cases of great difficulty be removed into the Queen's Bench. That court has also a peculiar jurisdiction for the trial of certain classes of misdemeanours by way of "*information*," which mode of trial is now rare, and is an exception to the ordinary common law method of trial of criminal causes, which is, upon *indictment* found by a grand jury. This court has also the exclusive power of issuing prerogative writs of *mandamus*, which are commands to persons, corporations, or inferior courts, to perform duties of their offices. The exclusive jurisdiction of the Court of Common Pleas appertains principally to certain "real" actions, now rare, which relate to rights of dower, and patronage of church-livings. The exclusive jurisdiction of the Court of Exchequer relates to the property and fiscal rights of the Crown.

By far the most important part of the jurisdiction of the three courts is that which they exercise in common over *personal actions*,

which are defined to be actions whereby a man claims a debt or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The most general division of personal actions distinguishes them according as they are founded upon *contracts* or *torts*; the former comprehending actions upon debt or promise, the latter injuries wilful or not wilful, where, from a given state of facts, the law raises a legal obligation irrespectively of any antecedent promise.

As the three courts are now constituted, they each consist of one chief and four *puisne* judges, who, in the Queen's Bench and Common Pleas, are called justices, and in the Exchequer are called barons. Matters of law are disposed of in each court when sitting in *banc*, that is, by several of the judges sitting together. Issues of fact to be tried by jury are rarely tried before either court, but are usually remitted to *auxiliary tribunals*. The principal of these are the Courts of Nisi Prius, which are held periodically in all the counties of England and Wales, under commissions from the Crown addressed to various judges of the three Superior Courts, and some others. There are also some other local courts which act as auxiliaries to the three Superior Courts, in trying, by jury, actions of minor importance.

The Court of Appeal from the three Superior Courts of Common Law is the Court of Exchequer Chamber, which is so constituted, that appeals from each of the three are heard by a certain number of judges of the other two.

Book II. Ch. X. Courts of Criminal Jurisdiction.

The branch of the judicature which is of the greatest constitutional importance, is undoubtedly that which relates to *criminal procedure*. The distinctions between civil and criminal procedure are, to some extent, arbitrary, and different in different ages and nations; but the main distinction between the two kinds of procedure consists (it is apprehended) in this, that the former gives restitution or compensation to the person injured, while the latter inflicts on the wrong-doer punishment which is independent of private redress.

The principal division of crimes, so far as relates to the manner of trying them, distinguishes them accordingly as they are triable by jury or without jury.

The trial of capital crimes, and the more serious kinds of felonies, ordinarily take place at Assizes under commissions of *oyer et terminer* and gaol delivery, directed by the Crown to various judges of the Superior Common Law Courts and others. The Assizes are usually held concurrently with civil sittings at Nisi Prius already described. But sometimes, upon urgent occasions, the Crown issues *special commissions* of oyer and terminer for the expeditious trial of offences which stand in need of special inquiry.

The minor crimes tried by jury are usually so tried before the courts of Quarter Sessions of Counties, or divisions of counties having their own commissions of the peace, or of Boroughs having their own commissions of the peace. In counties and divisions of counties the courts of Quarter Sessions are held before the county justices of the peace; in boroughs the Quarter Sessions are held before recorders,—sole judges appointed by the Crown in certain boroughs, with authority to hold the general borough sessions.

The justices of the peace just mentioned, and various stipendiary magistrates, have, by a multitude of statutes, summary jurisdiction to try petty offences without juries.

Criminal procedure in cases tried by juries consists of the following parts, in their progressive order:—1. The *summons or arrest*, by which the accused is brought before a justice for preliminary examination. 2. The *commitment* of the accused after such examination, or his admission to bail to secure his appearance at his trial. 3. The *prosecution*, which may be in either of three ways,—upon *indictment*, found by a grand jury; upon *inquisition*, found by a coroner's jury; or upon *information*, which is allowed only with respect to certain misdemeanours, and is the only kind of accusation triable by a petit jury without a preparatory finding of another jury. 4. *Arraignment* and pleading, by which the accused is called upon to declare whether he is guilty, and may thereupon plead guilty or not guilty, or plead matters in *bar*, as a former acquittal or pardon, or may object to the form and mode

of the proceedings on various technical grounds, as that they are before the wrong court, or that the indictment is insufficient. 5. *Trial and judgment.* After conviction, and before sentence, the convict may move the court in arrest of judgment; and even if he omit to make the motion, the court will of itself arrest judgment, if satisfied that the defendant has not been found guilty of any offence in law.

New trial is not allowed after acquittal of felony; it has been allowed after acquittal of misdemeanour in some cases, as where witnesses for the prosecution were kept back by the defendant. A new trial after conviction may be moved for on various grounds, such as the improper reception or rejection of evidence.

The *Court of Appeal* upon questions of law reserved by a court of *oyer et terminer* or quarter sessions, is the "Court for Crown Cases Reserved." Besides this, another but less usual mode of criminal appeal is to the Queen's Bench, Exchequer Chamber, and, ultimately, the House of Lords; this latter mode of appeal lies upon questions of law raised by demurrer, and for errors in the record.

The prerogative of *pardon* was, by an ancient statute, limited to cases of justifiable homicide, but has long been extended to all public wrongs, with very few exceptions. The exercise of this prerogative has been frequently viewed by Parliament with great jealousy, and subjected to various restrictions. In modern times the prerogative is exercised upon the recommendation of Secretaries of State, who, for the purpose of guiding their discretion in this respect, occasionally institute inquiries into the charges against convicted persons. These inquiries are frequently complained of, on the ground of their secrecy and irregularity.

Criminal procedure without trial by jury is regarded as exceptional to the principles of common law. The exceptions, however, are numerous, and include in modern times a number of offences larger than the number of those which are tried by juries. Among the exceptions to the ordinary mode of trial by jury are, trials of indictments in the House of Lords, and commitments for breach of privilege of either House of Parliament, or for contempt

of court. But the most numerous cases of summary criminal procedure are those authorized by a multitude of statutes which give to police magistrates and justices of the peace power to try minor offences according to a course of procedure which is described in the text.

Book II. Ch. XI. Courts of Special Civil Jurisdiction.

Besides the courts of law and equity which have general civil jurisdiction throughout the country, there are many courts having special civil jurisdictions, which are defined by considerations either of locality, or of the nature of the suits cognizable under them. These special courts are either those which belong to some general system of judicature, or certain isolated jurisdictions.

To the first class belong the *Ecclesiastical courts*, of which the principal are—archdeacons' courts, bishops' courts, archbishops' courts; the areas of the jurisdictions of which are—archdeaconries, dioceses, and provinces, respectively. The civil judicature of these courts has been greatly reduced, and now chiefly relates to ecclesiastical dues and rights of patronage.

The ecclesiastical jurisdiction was materially diminished by a statute of 1857, which transferred the non-contentious testamentary jurisdiction to the *Court of Probate*, and certain district registries of wills; and the contentious testamentary jurisdiction to the Court of Probate and the county courts. This latter jurisdiction includes causes of disputed wills, and rights to administer the estates of deceased persons.

Another diminution of the ecclesiastical jurisdiction was effected, in the same year by the establishment of a separate court of *Divorce and Matrimonial Causes*.

The *Admiralty* Court has cognizance of maritime causes arising upon the sea, as matters of salvage or damage by collision, maritime contracts, and some contracts which, though made on land, are executed at sea, as agreements for seamen's wages. A separate branch of the court (the Prize Court) has jurisdiction to determine causes of prizes and booty of war.

The Court of *Bankruptcy* has jurisdiction for the purpose of

distributing the estate of a debtor among his creditors. A statute of 1861 provides for the gradual abolition of the district courts of bankruptcy heretofore existing, abolishes the distinctions between the jurisdiction over insolvent traders and that over insolvent non-traders, and assigns the bankruptcy jurisdiction partly to the Bankruptcy Court in London, and partly to the county courts.

A debtor may proceed under this Act by a voluntary declaration of inability to meet his engagements, or may be brought under its operation compulsorily, for certain acts and defaults. After adjudication in bankruptcy, assignees are appointed to get in and realize the debtor's assets, the produce of which, if the bankruptcy proceeds, is distributed among the creditors; whereupon the debtor, if he has rendered proper accounts and otherwise conformed to the bankruptcy law, is discharged from the debts provable under his bankruptcy.

During the last few years great alterations have been made in the mode of trying civil causes of minor importance. By far the greater part of such causes are now adjudicated in *county courts*, for the establishment of which every county is divided into districts. Each county court is held before a single judge, who is generally judge both of questions of fact and questions of law, except in certain cases where a jury may be required. These Courts have jurisdiction of all legal claims of a limited amount, excepting claims to real property and certain actions of tort; and may have, by the consent of the parties, jurisdiction of any actions which may be brought in the superior courts of common law.

The ADMINISTRATIVE GOVERNMENT includes all those departments upon which devolves the execution of laws, so far as they can be executed by public officers without appeal to the judicature. In order to narrow the inquiry into this part of our subject, the attention will be confined to those administrative departments which have such a necessary connection with the other parts of the Government, that they are properly regarded as essential parts of the Constitution. The departments which are most important to be considered by the constitutional student

are those more ancient departments which *originated by Royal prerogative;* the departments of a more recent and statutory origin have, in general, a less important connection with the general scheme of British Government.

Book III. Ch. II. Administrative Prerogatives of the Crown.

Considering the administrative departments chiefly with reference to their prerogative origin and their duties of executing the prerogative duties of the Crown, our first inquiry obviously must be into the nature of those prerogatives. The administrative prerogatives may be classed, with sufficient precision, under six heads:—the Queen's Peace, the Public Defence, Foreign Affairs, Revenue, Trade, Franchises and other delegations of the Royal prerogatives.

The prerogatives comprised under the first head enable the Crown by its officers to maintain the *internal peace* of the country, and execute judicial processes and judgments. These prerogatives of the Crown, however, are now largely affected by statutory regulations of the *police* of the kingdom.

The prerogatives of the Sovereign relating to *public defence* include the power of the Crown of raising and regulating navies and armies. The power of maintaining armed forces did not belong to the Crown exclusively until after the feudal period, and the modern system of assigning to the Crown the supreme command of standing naval and military forces was not completely established until after the Revolution of 1688. The right of making war and peace is, by the English Constitution, vested in the Crown; but there are good reasons for concluding that the powers of the Crown in this respect were formerly more directly shared by Parliament than at present.

Closely connected with the prerogative of making peace and war, and in some measure dependent upon it, is the prerogative of sending and receiving *ambassadors*, and of negotiating *treaties*, which the English Constitution, differing from that of many other countries, vests in the Crown.

The prerogatives of the Crown with respect to the Royal *revenue* are now almost entirely controlled by statute. The profits

of Royal lands and hereditary revenues, which were formerly independent of Parliamentary control, are now, by particular arrangement with the Crown, consolidated with the rest of the public revenues which are disbursed under the direction of Parliament. The history of the steps by which Parliament has obtained this control of the revenue, and the gradual extinction of prerogative claims to impose taxes and customs without the sanction of Parliament, fully shows that the preservation of the Constitution mainly depends upon the power of Parliament to grant or withhold supplies to the Crown.

The prerogatives of the Crown with respect to inland and foreign *trade* were formerly principally important with respect to the assumed Royal power of granting monopolies and exclusive rights of trading. In the exercise of such power, important trading companies were established in the sixteenth and seventeenth centuries; but the prerogatives with respect to monopolies were abandoned after the Revolution. Several prerogatives of the Crown affecting trade, however, still exist, and include the rights of enforcing *blockades and embargoes*, and the right of appointing *ports and havens*.

The last branch of our inquiry respecting the Royal prerogative relates to a question of no little difficulty,—how far the Royal powers may be *delegated* by the Sovereign to others? In the text, we have shown how far that delegation has been exercised in practice. The most general exercise of it has been upon the appointment of Lords Justices or Guardians of the Kingdom during the absence of the Sovereign from England. Such appointments were frequently made in ancient reigns, and during the reigns of William III., George I., and George II. Another more common instance of the delegation of the Royal authority is in the various *franchises* which give to persons or corporations a share of the Royal prerogatives, particularly with respect to judicature, matters of police, and prerogative revenues.

The *jus coronæ*, or right of succession to the Crown, is generally hereditary, according to a course of inheritance which agrees

nearly, but not wholly, with the English law of inheritance of land. The differences between the two kinds of inheritance relate to the rights of coheiresses, of relations of the half blood, and of lineal ancestors.

The course of hereditary succession to the Crown has also been several times interrupted, and resettled by Parliament. The instances in which this power of Parliament has been exercised, occur at periods of our history widely remote—under the Plantagenets, under the Tudors, and after the Revolution. Besides the alterations of the course of succession to the Crown, Parliament has repeatedly exercised a power of vesting the regal authority, during the infancy or other incapacity of the reigning prince, in others.

Book III. Ch. IV. Origin and Distribution of Administrative Offices.

For reasons already given, the administrative departments which are of the greatest constitutional importance are those which exercise prerogative powers of the Crown, and are not merely of statutory origin. Comparing the administrative civil government as it exists now and as it existed at or shortly after the Conquest, we find that of the four administrative departments existing at that early period—*the Select Council, the Chief Justiciary, the Chancery, and the Treasury*—the first retains nearly its original constitution, the second has been entirely abolished, the administrative duties of the third have been in a great measure transferred to the more recent offices of the Secretaries of State, and the fourth subsists in a materially altered form. Similarly comparing the ancient and modern naval and military offices, we find that, with respect to the management of the navy, the modern functions of the Admiralty are similar in their nature to those which it discharged anciently, but that the modern administration of the army has no prototype in feudal times. The existing administrative offices, notwithstanding their multifarious nature, admit of a simple classification. They are—the *Privy Council*, and departments connected with it; the *Secretarial Offices*, and departments connected with them; the *Fiscal Offices*; the *Naval and Military Offices*. Among these departments are methodi-

cally distributed duties relating to the several administrative prerogatives of the Crown which have been enumerated in the second chapter of this Book.

The administrative duties of the *Privy Council* are now in general discharged by committees and select portions of it, of which the principle is the *Cabinet*. Formerly, the Privy Council at large managed the general administrative government, but in and after the reign of Elizabeth, a great part of the business of the Privy Council was transferred to the Secretaries of State. At the present time, the most important meetings of the Privy Council, in its administrative capacity, are of two distinct kinds,—Privy Councils held by the Queen, and meetings of the Cabinet not held in the presence of the Queen. When the Queen holds a Privy Council, it is usually attended only by the comparatively small number of the whole body who constitute the Cabinet. There does not appear to be any precise rule distinguishing between those prerogative acts which are properly exercised by the *Queen in Council*, and those which are exercised on the advice of individual ministers. The distinction depends partly on usage and partly upon statutes, and it seems nearly correct to say that political acts of the Crown which are of the most general importance, are performed in Council, and other acts, of less extensive operation, upon the advice of individual ministers. The meetings of the Cabinet not in the presence of the Sovereign are merely voluntary, and in no way recognized by law. Their proceedings are usually communicated to the Queen.

There were formerly many committees of the Privy Council, which were established as distinct administrative departments; but there are now only two such committees regularly established,—the *Committee for Education*, which manages the funds voted by Parliament for the purposes of public education in this country, and the *Board of Trade*. The latter had formerly the principal business of administration of foreign trade and the colonies; but its colonial administration was, in the last century, in a great measure transferred to a Secretary of State. Since that

time, the functions of the Board of Trade have been principally confined to mercantile matters, and the administrative control of various public companies, with respect to which important powers have been given to the Board by modern statutes.

Book III. Ch. VI. The Secretarial Departments.

The office of Secretary of State is of later origin than the other administrative offices instituted by prerogative. The office of Secretary of State grew out of that of the King's private secretary, and first became important when the Chancellor, on account of the increase of his judicial functions, became unable to discharge the duty of conducting diplomatic correspondence. The Secretary became first a great officer of State about the time of Henry VIII., but long afterwards his position was one of constant subordination to the Privy Council. Gradually, however, a large part of the ancient duties of the Privy Council, in the administration of domestic, colonial, and foreign affairs, were transferred to Secretaries of State.

The divisions of the secretariat have been subject to repeated variations. During the present century, until the year 1855, there were always three Secretaries of State,—one for home affairs, one for foreign affairs, and a third for the colonies. Since 1855 there have been added a Secretary of State for War, and another for India.

The administrative powers of the Secretary of State for the *Home Department* are now exclusively such as relate to the internal affairs of the kingdom. The following appear to be the principal subjects of the business of this department:—Police, Royal grants and appointments, and the Signet.

Under the head of *Police*, by which is meant that department of Government which has for its object the maintenance of the internal peace, the prevention of crime, and the protection of public order and public health, the Secretary of State has the superintendence of the administration of justice, so far as the Royal prerogative is involved in it, and multifarious statutory duties with regard to the management of the constabulary and prisons, and the enforcement of sanitary laws.

The most ancient duty of the Secretary was the custody of the King's signet. The authority for passing grants under the Great Seal is, with some exceptions, by warrant under the sign-manual, countersigned by a Secretary of State, and sealed with the *signet*.

The Royal prerogatives in international affairs are exercised, partly by the Queen in Council, and partly upon the advice of the *Secretary of State for Foreign Affairs*, who is principally responsible for the negotiation and conclusion of foreign treaties. The largest part of the business of the Foreign Office consists in diplomatic correspondence, which is required to be carried on with the cognizance of the Crown. Another important branch of the functions of this office is the correspondence with British consuls abroad, respecting trade and other matters within their jurisdiction.

The *Colonial department* was not constituted as a distinct branch of the Secretariat until some time after the commencement of the reign of George III., the colonial administration having previously been under the Board of Trade. The authority of the Home Government over the Colonies is exercised by the Secretary of State for the Colonies, and the occasions on which that authority is exercised are principally the appointment of governors and certain other colonial officers, and the allowing or disallowing colonial enactments and ordinances.

The office of *Secretary of State for India* originated in 1858, by the statute which transferred the government of India from the East India Company to the Crown. The statute constitutes a council of India, for the administration of East India government, in this country. In this council the Secretary of State for India has supreme power. He maintains a correspondence with the Indian local governments, which are—first, that of the Governor-General, who, with his council, is empowered to make laws for the government of the whole of India; and secondly, the governors of the presidencies, who, with their councils, are empowered to make laws for their respective provinces.

The office of Secretary of State for War is considered in a subsequent chapter.

The receipt and expenditure of the public revenue constitute those branches of the Executive Government over which Parliament has exercised the most constant and vigilant control. In endeavouring to make clear the somewhat complicated system of administration of the public revenue, it will be necessary to keep in mind the nature of the Royal fiscal prerogatives, and the methods of Parliamentary supply referred to in previous chapters.

With respect to the ancient constitution of the fiscal offices, the chief matter of interest to the student of the Constitution is the early separation of the *Receipt of Exchequer*, where the Royal revenue was received, from *the Treasury*, which required its issue out of the Exchequer. This division is observable at a very early period of the Constitution; but the Exchequer remained in a great measure under the control of the Treasury until after the reign of Charles II. It is obviously essential, to the effectual Parliamentary control of the public money, that the officers who have the custody and issue of it should be independent of the political ministers of the Crown; but the necessary independence of the Exchequer has not been completely established until modern times.

The present system of administering the public revenue may be considered under three heads—the *receipt of public money; the issue of public money; audit.*

The first of these subjects is comparatively simple. The public revenue, when it consisted chiefly of hereditary and prerogative revenues of the Crown, was collected by sheriffs and other local officers, who accounted for it to the Exchequer. Now the collection of public revenue is transferred to others. The chief portion of it arises from Parliamentary taxes and customs, and this revenue, and nearly all the other public revenues, are paid into the Bank of England to the account of the Exchequer, and constitute one general fund, out of which the credits to the various officers, to whom money is to be issued for the public service, are satisfied.

The *issue of the public revenue* is under the control of the Exchequer. The necessary independence of its officers is secured

by the appointment of a "Comptroller-General," who holds his office permanently, subject to removal on the address of both Houses of Parliament.

In the issues by the Exchequer, the practice with respect to Parliamentary annual grants differs from that with respect to the permanent charges on the revenue. With respect to the former, the first authority for the disbursement is a *Royal order*, which refers to the particular Parliamentary grant, and authorizes the Comptroller-General to place the amount voted to the credit of the proper officer. This Royal order is put in operation by *Treasury warrants* for specified portions of the amount voted. The Exchequer, if satisfied that the Treasury warrants do not exceed the total amount voted, authorizes the Bank of England to issue the specified sums accordingly.

The course of issue, with respect to permanent charges on the revenue, differs from that just described by omitting the Royal order.

A defect of this system consists in this, that where the same officer is paymaster for different services, he is not prevented by any control of the Exchequer from temporarily applying to one service moneys appropriated to another, provided that the interchange of appropriations is ultimately corrected. For the remedy of this defect various methods have been proposed, and Parliament has recently extended one of them—the *appropriation audit*, by which accounts of the actual appropriation of moneys granted for naval and military services, and various branches of the public service, are required to be audited and submitted to Parliament.

The administration of the military and naval forces of this kingdom presents a remarkable solution of one of the most difficult and important problems in the science of Government,—viz. to devise means of securing the constitutional control of Parliament over those forces, without impairing their discipline, or derogating from the necessary authority of the executive over them.

Standing armies were not established in England until after the restoration of Charles II. Previously, the constitutional military forces consisted of feudal troops raised by the tenants of the Crown and their vassals, under the obligations of military tenures; the *posse comitatus* for the internal defence of counties; and stipendiary forces, which however were not regularly maintained, except in time of war. After the Revolution, the system was adopted of maintaining the army under temporary Acts of Parliament—the Mutiny Acts, which have ever since been regularly renewed, and authorize the Crown to maintain a specified number of troops for one year, and to try and punish offences against military discipline by a code of martial law differing materially from the common law. With respect to the navy, the Mutiny Act is not temporary, but permanent; but the numbers of the naval, as well as of the military forces, are effectually controlled by the power of Parliament of refusing supplies for maintaining them.

The administration of the army has been materially altered within the last few years, and a number of offices relating to it have been consolidated. The principal features of the administration of the army, as at present constituted, are the establishment of two offices; the one having the *civil and financial* affairs of the army, the other the *military discipline and patronage* under its more immediate management. The former of these offices is that of the Secretary of State for War, the latter the office of the Commander-in-Chief. In the office of the *Secretary of State for War* are consolidated the following offices, which were, until lately, separate departments—the office of "Secretary-at-War," who managed the financial affairs of the army; the civil branch of the Ordnance Office, which superintended the supplies of arms and materials of warfare, and the construction of military works and barracks, and the Commissariat, so far as relates to the supply of provisions, forage, and means of transport. In the office of the *Commander-in-Chief* is now united the military administration of the whole army, including the artillery and engineers. The Commander-in-Chief has a more permanent tenure of his

office than the Secretary of State for War, as the latter resigns his office whenever a new cabinet is formed. It is said that the authority of the Commander-in-Chief is strictly subordinate to that of the Secretary of State, but the latter exercises only a nominal supervision of the patronage and discipline of the army.

In the *administration of the navy* there is no such division of the civil and martial government as in the army. The entire administration of the navy is under the *Admiralty*, a department which has existed from very early times. Formerly, the department was under the management of Lords High Admirals; but some time before the Revolution it became the practice to assign the office of Lord High Admiral to be executed by commissioners, and that practice has been adhered to ever since the Revolution, with rare exceptions. The ancient history of the navy presents this point of resemblance to that of the army, that anciently the naval force was not permanent, but was raised as occasion required. The standing naval force dates from the reign of Henry VIII. From that time the Admiralty has had the management of the Royal dockyards, the construction and equipment of ships, and the discipline and patronage of the navy and marine forces. The Admiralty Board consists of several commissioners, among whom the offices just mentioned are distributed; but the supervision of the whole, and the responsibility to Parliament for the proper management of the navy, belong to the First Lord of the Admiralty, who is ordinarily a member of the Cabinet.

The division of this kingdom into separate provincial and municipal governments, which managed their own internal administration, existed in a very complete manner in the Anglo-Saxon period. In the fourteenth century, the counties lost the elective constitution of their magistracy, and they never regained it. The boroughs, on the other hand, obtained in many cases elective municipal institutions by charters from the Crown. By the more ancient of these charters, the suffrage for electing municipal officers was very liberal; but under the Tudors and Stuarts these

charters were superseded by others, which gave to the boroughs self-elective councils. Thenceforward, until the reform of municipal corporations in the reign of William IV., the government of boroughs was usually in the hands of a few irresponsible persons, and was subject to gross abuses. The Act for the Regulation of Municipal Corporations, which was passed in the year 1835, establishes for almost all the important boroughs of England a uniform constitution. Under this constitution a constituency of each borough, consisting generally of the rated resident householders, elect a Town Council, to which is entrusted all the deliberative and administrative functions of the corporation. These functions relate chiefly to matters of police, and the local rates.

In numerous unincorporated towns somewhat similar functions are assigned by special Acts of Parliament to local commissioners.

In counties, the same kinds of functions appertain to the county magistracy, or justices of the peace, who have the maintenance of county gaols, prisons, bridges, and police. The magistrates in Quarter Sessions have power to order county rates for any of the purposes to which the county stock is liable, whenever they think fit. The ratepayers have a right to appeal to the Quarter Sessions against errors and inequalities of rating, but have no control over the management and expenditure of the county funds.

THE BRITISH GOVERNMENT.

BOOK I.—LEGISLATURE.

CHAPTER I.

DIVISIONS OF GOVERNMENT.

THE foundation of political government is the need of some supreme power in every civil community for the protection of the rights of its members. The collective force at the disposal of the government, gives to each of its subjects a security for his person and property which his own strength could not procure for him; and it is clear that unless such collective force were effectually exerted to overcome aggression against individual rights, the community must soon be dissolved, or cease to have a separate existence.

Again, in every form of government, however rude or despotic, the action of the State will be in a greater or less degree regulated by *Laws*, that is, rules which authoritatively, publicly, and prospectively declare the rights and obligations which the State will enforce. It is obvious that government by laws has these advantages over arbitrary government,—that the laws, being publicly declared, give information to the people of the extent of their civil rights and obligations; and that the laws, being made prospectively, are more likely to be impartial and temperate than are resolutions taken by the ministers of government with

reference only to particular cases after they have arisen. "One of the greatest advantages of our English law is," says Blackstone, "that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious; nothing is left to arbitrary discretion. The king, by his judges, dispenses what the law has previously ordained, but is not himself the legislator. . . . Sir Edward Coke will inform us that it is one of the genuine marks of servitude to have the law which is our rule of action either concealed or precarious: '*misera est servitus, ubi jus est vagum aut incognitum*'" (*a*).

It is requisite at the outset of this inquiry to define the limits of constitutional science. It is the province of the science of legislation to investigate generally the principles upon which laws ought to be founded; but of constitutional science, to consider only the *manner* in which laws ought to be made and executed. It is therefore not intended here to enter at large upon that wide field of investigation which the science of legislation comprehends, but to survey only that part of it which relates exclusively to the method adopted in this country of making and executing the laws.

The twofold object of constitutional science just mentioned, corresponds to a division of the functions of government into two classes,—that of making laws, and that of executing them. As the separation of these two functions of government is of the highest importance to the fulfilment of its purposes, some of the consequences which result from their union or separation require particular consideration.

In the first place, it is clear that if the supreme power of making and abrogating laws were given to those ministers of government who are charged with the execution of them, the laws would be liable to be changed or abrogated whenever they restricted the power of the executive government, or were unfavourable to its designs. The result would be that the laws would lose the certainty and permanency

(*a*) Blackstone, 'Commentaries,' 417.

which are the chief elements of their value. The history of this country is full of examples of endeavours of the executive government to get the legislative power into its own hands; and the result of such endeavours, when successful, has always been to produce uncertainty and confusion in the laws. There may be unforeseen emergencies in which it is proper that a power should be given to the executive government of suspending laws temporarily, but that power is in England, as we shall see hereafter, confined within narrow limits.

Government by laws requires that the governors themselves be subject to the laws. In England, by the separation of the legislative and executive bodies, and the distinct powers given to each, each is rendered subject to the law. The executive has only those powers which the laws assign to it, and, by means which we shall have to carefully inquire into, is restrained from exceeding them. Again, the separation of the executive from the legislative body effectually subjects the latter also to the laws; for, as it has not the function of putting the laws into execution, it has not continual power of suspending or relaxing their operation in favour of its own members.

A very little consideration will show that these effects could not be secured without the separation in question. However stringently laws be expressed, an executive which has the power of abrogating or altering them to meet particular cases will be prone to do so. It may be partially restrained by apprehension of unpopularity or of the hostility of powerful classes of the community, but the restraint can never be completely effectual.

"If I were required," says De Lolme(*a*), "to point out the principal events which would, if they were ever to happen, prove immediately the ruin of the English Government, I would say—The English Government will be no more, either when the Crown shall become independent on the nation for its supplies, or when the representatives

(*a*) On the Constitution, book ii. ch. 19.

of the people shall begin to share in the executive authority."

The separation of the government into its two component parts, the Legislature and the Executive, is the gradual result of improvements in the Constitution. In the early history of a nation, its executive and legislative government are almost necessarily conjoined, and it is only as its constitution becomes settled, that the importance of separating the two functions of government is perceived and insisted upon(*a*).

The extent to which this principle is carried in our own constitution will be particularly considered hereafter. The principle is not carried so far as to exclude all members of the executive from places in the legislature, nor so far that all legislation proceeds from the supreme legislature exclusively.

If the separation were carried out with extreme exactness, the executive could not make any general prospective rules enforcible by public authority. But it is clear that such a limitation of the power of the executive bodies would be attended with great inconvenience. The Legislature has therefore delegated in many cases a power which is, according to the preceding definition, legislative. Thus Parliament has often tacitly allowed or expressly delegated to the Privy Council a power of declaring when and how statutes shall come into operation; to the courts of law, the power of making rules for their own procedure; and to corporations, of making bye-laws. But in all these cases of express or implied delegation of legislative power, the authority so conferred is in our constitution subordinate to that of Parliament. To this extent only is the separation of the legislature and the executive carried in our constitution,—and to this extent only do the preceding arguments

(*a*) "The Heliæa of classical times was simply the Popular Assembly convened for judicial purposes. . . . The history of Roman criminal jurisprudence begins with the old Judicia Populi, at which the kings are said to have presided. These were simply solemn trials of great offenders under legislative forms." ('Ancient Law,' by Henry Sumner Maine, p. 382.)

require the separation,—that the legislature and executive are, in the exercise of their special functions, each independent of the other and supreme.

This rule limits the participation of the executive in legislation, and also the participation of the legislature in the work of the executive. De Lolme says in the passage above quoted that the government will be no more "when the representatives of the people shall begin to share in the executive authority." But it is not to be inferred that every interference of the legislature in the ordinary functions of the executive is an invasion of the principle of separation in question; for, as has just been said, the ordinary functions of the executive often include some which are virtually legislative; therefore when the legislature interferes with these, it merely resumes part of its delegated authority. The principle in question is violated only where the legislature controls the execution of the laws in particular cases after they have arisen.

We have next to consider the divisions of the executive power. It has numerous divisions, according to the nature of its functions. The broadest classification of them is that which distinguishes the *judicial* from the *administrative* bodies. The essential attribute of the former is the power of authoritatively interpreting the laws(*a*). The administrative bodies discharge those functions of executive government which do not require for their performance authority to interpret laws.

This division of the offices of government under the heads of *Legislature, Judicature,* and *Administration,* is apparently the same as that adopted by Aristotle in his 'Politics,' where

(*a*) Another definition of the judicial power which might be suggested, is that it determines the lawful consequences of infractions of the law and redresses them; but this definition would not be quite exact. The former part of it, indeed, involves the power of interpreting laws, which in the text is stated to be essential to the judicature; but the latter part of the suggested definition extends to functions not exclusively judicial. There are some cases in which injuries may be lawfully redressed by the acts of the persons injured, *e. g.* the abatement of nuisances. See 3 Blackstone, ch. 1.

he makes government to consist of three parts—*τὸ βουλευόμενον, τὸ περὶ τὰς ἀρχὰς, τὸ δίκαιον:* Montesquieu, in the 'Esprit des Lois,' adopts nearly the same classification. He says, "There are in every state three sorts of powers, the legislative power, the executive power in matter relating to public rights (*droit des gens*), and the executive power in matters relating to civil rights. By the first the ruler makes temporary or permanent laws, and amends or abrogates existing laws. By the second he makes peace or war, sends or receives ambassadors, establishes public safety, and prevents invasions. By the third he punishes crimes or judges private disputes. This latter may be termed the judicial power, and the other simply the executive power"(*a*). He proceeds to point out the consequences of uniting these powers in the same person:—"When the legislative power is united to the executive in the same person or the same body of the magistracy, there can be no liberty, for there is always the danger that the monarch or senate will make tyrannical laws in order to execute them tyrannically. Neither can there be liberty, if the judicial power be not separate from the legislative and executive. If it be joined to the legislative, the power over the lives and liberties of the citizens will be arbitrary, for the judge will be the legislator. If it be joined to the executive, the judge may have the power of oppression."

The following considerations respecting the effect of uniting the judicial power with either of the other powers may be added. The operation of laws must depend in a considerable degree upon their interpretation. If the power of interpreting the laws were given to the administrative body, it would possess the means of indirectly undoing to a great extent the work of the legislature by misinterpreting its enactments. On the other hand, if the judicial power were combined with the legislative, the latter would have the power of making a special law for every special case as it arose, and therefore would not be under the necessity of

(*a*) De l'Esprit des Lois, liv. 11, ch. 6.

framing the laws with the generality which is one of the conditions of their fairness. Among instances of the evils of combining the judicial and administrative power may be cited the example of the Star Chamber, in which the principal judges were administrative officers of the Crown, and in which, consequently, the judicial power was perverted to the worst political purposes(*a*). Among instances of the evils of combining the judicial and legislative power may be cited the enormous abuses which at one time prevailed with respect to parliamentary privileges, when the Houses of Parliament, and especially the House of Commons, without laying down beforehand any rules defining those privileges, were accustomed to exercise very oppressively the power of adjudicating upon cases of alleged breach of privilege(*b*).

A further division of the functions of government has to be made, which is of an entirely different kind to that above referred to, and distributes the offices of government *locally* under the heads of domestic, colonial, and international government. The distinction of legislative and executive functions is most completely observed with respect to domestic government; with respect to the colonies the work of legislation, so far as it is carried on in the country, is performed partly by Parliament and partly by the administrative government. In international affairs, also, the powers of the legislature are necessarily very different from those which they exercise in domestic affairs. The three essential attributes of making, interpreting, and administering laws, exist in each of the three divisions of domestic, colonial, and international government, but in such a different manner in each that it will be necessary to consider the domestic government separately from that which relates to the colonies and foreign nations.

(*a*) See as to the constitution and abolition of the Star Chamber, Book I. ch. 10, *infra*.

(*b*) These cases are further considered in a subsequent chapter.

CHAPTER II.

THE AUTHORITY OF PARLIAMENT.

THE supreme legislative power of the British Empire is by its constitution given to Parliament. "The jurisdiction of this Court," says Coke, "is so transcendent, that it maketh, enlargeth, diminisheth, abrogateth, repeateth, and reviveth laws, statutes, acts and ordinances concerning matters ecclesiastical, capital, criminal, common, civil, martial, maritime, and the rest." And Blackstone, after speaking to the same effect as to the legislative power of Parliament, adds, that it is "the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms" (*a*).

"The will of the legislature," says a later authority, "is the supreme law of the land, and demands perfect obedience. But while we admit this conclusive of English law we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when Chief Justice of the King's Bench, to declare, as he did in Doctor Bonham's case, that the common law doth control Acts of Parliament, and adjudge them to be void when against common right and reason. Perhaps what Lord Coke said in his reports on this point may have been one of the many things that King James alluded to, when he said that in Coke's reports there were many conceits of his own uttered for law to the pre-

(*a*) Co. Litt. 110 *a*; 1 Blackstone, ch. 2.

judice of the Crown, Parliament, and subjects"(*a*). Coke's words in the passage referred to are—"It appears in our books, that in many cases the common law will control Acts of Parliament, and sometimes adjudge them to be void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void"(*b*); and it appears by the context that Coke refers to cases of obvious mistakes in Acts of Parliament, and that he does not assert any power of the judges to control the *clearly manifested* intention of the legislature.

It must not be overlooked that in many important cases Parliament systematically abstains from legislating, or allows laws made by other bodies.

Thus the Act for the union of England and Scotland expresses several restrictions of the powers of Parliament, and declares that the Acts for settling the Church-government in England and Scotland "shall be ever held and adjudged to be, and observed as fundamental conditions of the said union." Similarly the Act (*c*) for the union of Great Britain and Ireland provides for the perpetual observance of the articles of union agreed to by the Parliaments of the two kingdoms.

Again, Parliament abstains from taxing the Colonies for the benefit of this country. The attempt to impose taxes on the provinces of North America having led to the severance of those States from the British Empire, an Act(*d*) was passed, which has been styled the Colonial Magna Charta, which declared that the Parliament of Great Britain will not impose taxes on the Colonies of North America for the use of this country. The principle of this Act is observed in practice with respect to all the British Colonies.

These are some of the instances in which Parliament systematically abstains from legislation. There are also

(*a*) Kent's 'Commentaries on American Law,' part iii. lect. 20.
(*b*) 8 Coke's Reports, 118.
(*c*) 39 & 40 Geo. III. c. 67. (*d*) 18 Geo. III. c. 12.

cases in which Parliament allows laws to be made by other bodies. Thus a large part of the law not founded on enactments is that which has been styled *judge-made* law—that is, law of which the authority depends on judicial decisions. The system of jurisprudence administered in English Law-courts is in a great measure independent of statute-law, and an important part of the common law is more ancient than any statute extant.

Again, among laws made by other powers than that of Parliament, are laws which the Sovereign, by prerogative, has power to make. In other cases Parliament has expressly delegated to the Colonies a power of making laws for their own internal government, and a somewhat similar power is given to municipal corporations in this country.

Lastly, by the comity of nations, or by treaties, many international rights are established, which, as they are founded on mutual agreement of nations, cannot generally be abrogated by the statutes of any particular nation (*a*).

(*a*) Story, 'Conflict of Laws,' ch. 2.

CHAPTER III.

THE ORIGIN OF PARLIAMENT.

It is scarcely possible without some reference to the ancient history of Parliament to give a clear account of its present constitution; but it will be sufficient in this place to summarize a few ascertained particulars which appear to be of the greatest constitutional importance, without adverting to controverted questions, or those of merely antiquarian interest(*a*).

William the Conqueror confirmed to a considerable extent the Saxon laws and customs, but established no national assemblies similar to the general assemblies under the Saxon kings(*b*).

According to the usual obligations of feudal tenure, the immediate free tenants of every superior lord were bound to attend his court, and the King's immediate tenants were bound to attend his court. The Charter of John recognizes as already existing the right of all tenants-in-chief of the Crown, or at least those who held by military service, to be summoned to a common council of the realm, in order to give validity to any extraordinary aid to the Crown. It ap-

(*a*) A full account of the literature of the history of Parliament is to be found in the preface to 'The Parliaments and Councils of England, chronologically arranged, from the Reign of William I. to the Revolution in 1688.' By Charles Henry Parry. Lond. 1839.

(*b*) As to the ante-Norman councils, see Palgrave's 'Rise and Progress of the English Commonwealth;' Parry's 'Parliaments,' ch. 1.; Butler's Co. Litt. 110 *a*.

pears, however, that the greater part of these tenants used not to attend such councils, and that they were attended probably by those only who were specially summoned. Also, by the Charter of King John, no provision was made for general councils except where aids were to be granted(*a*).

There is strong ground for believing that the origin of the representation of the Commons was the impossibility of assembling all the tenants-in-chief of the Crown according to the Charter of John(*b*).

In the first year of John's successor, Henry III., the Great Charter was renewed, but with several alterations. Among these, the most important was the omission of the clauses relating to aids, and to the constitution of the common council(*c*).

Henry III. was engaged in almost incessant contests with the Barons, who insisted upon the observance of the Great Charter, which he repeatedly violated. In the forty-second year of his reign a great parliament assembled at Oxford, of the prelates, earls, and nearly one hundred barons, at which the king and barons jointly appointed a committee to amend all matters appertaining to the king and the kingdom. A subsequent ordinance of this parliament directed that four knights chosen out of every shire, should inquire into grievances, and their reports were to be delivered to Parliament by the sheriffs.(*d*)

Shortly afterwards the king procured from the Pope a dispensation from these provisions of Oxford; but the barons refused to acknowledge the dispensation. A parliament was assembled in 48 Henry III. (June 24, 1264), to which were summoned knights, elected by the assent of their counties (*per assensum ejusdem comitatus*), to treat with the king of the affairs of state(*e*).

In the next year, 1265 (49 Henry III.), a parliament

(*a*) Parry's 'Parliaments,' Introduction.
(*b*) Report on the Dignity of a Peer, p. 60 *et seq.*
(*c*) Parry, 24 *n.* (*d*) *Ibid.* 38 *n.*
(*e*) *Ibid.* 43. A full account of the provisions of Oxford is given in the Report on the Dignity of a Peer, division 4.

was held, summoned by writs addressed to 122 prelates and ecclesiastics, to twenty-two earls and barons; to the *sheriffs of counties for sending knights; to cities and boroughs for sending burgesses;* and to the Cinque Ports for sending representatives(*a*).

The first clear evidence of the election of representatives of the Commons appears from these writs, which are therefore the first clear evidence of a popular representation in the legislature. The assembly of 49 Henry III. is now generally considered the origin of the House of Commons(*b*). The king was then in captivity in the hands of Simon de Montfort, Earl of Leicester, and it is probable that the writs were issued by his influence.

There is no clear evidence of any subsequent convention of a legislative assembly resembling that of 49 Hen. III., until 23 Edw. I., A.D. 1295. The earliest summons which is known to have been addressed to *Sheriffs* for the election of citizens and burgesses is of the latter date(*c*). Probably the previous writs to cities and boroughs were sent to their own municipal officers.

Great irregularities prevailed in the summons of Parliaments during the reign of Edward I. Thus, on one occasion, two assemblies of knights and burgesses were summoned simultaneously; the representatives of southern shires to Northampton, and of northern shires to York(*d*). Many similar instances of irregularities in the reign of Edward I. might be cited.

In that reign however the proceedings of the legislature assumed a more regular form, though for a long time afterwards the assent of the Commons was not always deemed essential to the enactment of laws. The confirmation of

(*a*) Parry, 44.

(*b*) On this important point the later researches confirm the conclusions of earlier investigations of the history of Parliament. See *inter alia* Butler's Co. Litt. 260 *a* (note); 1 Ruffhead's Statutes, p. x.; Hallam's Middle Ages, ch. 8, part 3; the Report on the Dignity of a Peer, p. 154; Parry's 'Parliaments,' p. xiii.

(*c*) Butler's Co. Litt. *ubi supra;* Parry, xiv.

(*d*) Parry, 51.

charters in the twenty-fifth year of this reign (A.D. 1297), and the statute De Talliagio non Concedendo (*a*) bound the king not to impose taxes without the consent of the Commons.

These explicit concessions seem to have concluded for a time the contests between the Crown and its subjects, with respect to the power of imposing charges on the subjects without their assent; and thenceforth the convention of Parliament, when the Crown required aids, became frequent (*b*).

The charter of 1 Hen. III. had, as we have stated, omitted the clauses of King John's charter respecting the *commune concilium*. The same was the case in many subsequent confirmations of the charter (*c*). The first solemn act by which the constitution of the legislative assembly was recognized, subsequently to the abandonment of the part of the charter of John which related to that assembly, was the Act 15 Edw. II., A.D. 1322, which provides that "the matters to be established for the estate of the King and his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in Parliaments by the King, and by the assent of the Prelates, Earls and Barons, and the Commonalty of the Realm, as has been before accustomed." This statute is considered by a high authority to have extended to all legislative purposes (*d*).

There can be no doubt that early in the fourteenth century the right of assent in the Commons to the making of laws in Parliament had become established. The right is repeatedly recognized in the statutes of Edward III. and his successor Richard II., though in both reigns it seems to have been sometimes arbitrarily disregarded (*e*).

(*a*) Blackstone says the statute *De Talliagio* is only a sort of translation of the *Confirmatio Cartarum*. (1 Commentaries, 140 *n*.) The statute De Talliagio is attributed, in some printed collections, to 34 Edw. I., but its date is more probably 25 Edw. I. (Report on the Dignity of a Peer, p. 230.)

(*b*) Lords' Report on the Dignity of a Peer, p. 230.

(*c*) Parry, 24 *n*.

(*d*) Lords' Report on the Dignity of a Peer, p. 283.

(*e*) The Commons complained repeatedly of taxes levied in the reign of

There seems to be no evidence that the Lords and Commons ever *voted* together, though it appears probable that the Commons, in the reign of Edward III., sat in Westminster Hall with the Lords, but had an assigned place for separate deliberation. Even so late as nearly the end of the fourteenth century, the Commons did not always constitute a single body; for, as we shall see in the chapter relating to that subject, the knights and burgesses at that period assessed separately taxes to be imposed on shires and towns respectively (*a*).

Parliaments were originally judicial as well as legislative assemblies. The Commons, being mere delegates for fiscal contributions, took no part in the exercise of the judicial functions; and in 1 Hen. IV., A.D. 1399, a petition of the Commons and the answer of the king recognize the legislative capacity of the Commons, but that judgments in Parliament belonged to the King and Lords only (*b*).

In the reign of Edward I. the word "Parliaments" was

Edward III. without their consent. (Report on the Dignity of a Peer, division 10; Parry's 'Parliaments,' 118 *n.*, 119, 120.) In 22 Edw. III. the Commons complain that answers given to Bills in Parliament were subsequently altered without their consent. (*Ibid.*)

In 6 Ric. II. a statute was revoked because never assented to by the Commons. Ruffhead, preface to Statutes, xiv. *n.* But in a note to Butler's Co. Litt., 159 *b*, it is considered that the right in the Commons of assent was not disputable so late as the reign of Richard II. One of the articles of accusation against Richard II., exhibited in Parliament, 1 Hen. IV., was that Richard had very often commanded very many things to be done against statutes unrepealed. (1 State Trials, 145.)

(*a*) Coke, 4 Just. 2, considers that the two Houses sat together so late as 6 Edw. II., A.D. 1332. Hatsell thinks that the record referred to by Coke does not warrant his conclusion, but that it is probable on other grounds. (2 Precedents, 281 *n.*) The record in question states that in 6 Edw. II. the Clergy, Lords, and Commons, consulted each by themselves. This is the first record of the separation of the Lords and Commons. (Parry's 'Parliaments,' xix.)

The first record of the *places* of meeting is 17 Edw. III., A.D. 1343, when the cause of summons was declared in the *Chambre de Peynte*, where the Commons afterwards remained, the Lords withdrawing to the *Chambre Blanche*. (Parry, 114.)

(*b*) See further as to this petition and answer in the chapter relating to "Supply."

frequently applied to the assemblies of the four great courts as well as to the Great Council of the realm; but about the commencement of the reign of Edward II. the word began to be used to express a legislative assembly, rather than the meeting of the king's Great Council and Great Courts of Justice(*a*).

We shall see in the next chapter that for a long time after the right of the Commons as an essential part of the legislature was recognized, the Acts of Parliament were not directly enacted by them, but were usually framed upon the answers of the Crown to their petitions.

The present constitution of Parliament, consisting of three integral parts of the Crown,—the Lords spiritual and temporal forming one assembly, and the Commons, *i. e.* knights, citizens, and burgesses, forming one assembly, —has been maintained nearly unaltered from the time to which we have referred to the present. In 1640, when successive Parliaments had refused to grant supplies without redress of grievances, Charles I. attempted to revive the ancient Great Council of Peers(*b*). There have been subsequently some instances of the suspension of the regular constitution of Parliaments, as during the interregnum, and, again, after the abdication of James II.; but excepting these irregularities, it has been a fundamental principle of the English Constitution that every lawful Parliament consists of three constituent parts,—the King, the Lords, and the Commons.

(*a*) Parry's 'Parliaments,' xi.

Mr. Macqueen, in his 'Appellate Jurisdiction,' p. 5, states that in the early part of the reign of Edward I. Parliaments were generally holden four times a year, but that late in the reign the sessions were less frequent and longer, and the business transacted partook less of a judicial and more of a legislative character. The learned writer appears to have overlooked the double signification of the word Parliament. We have already stated that there is no clear evidence of the convention of legislative Parliaments during the first twenty years of the reign of Edward I., and it is quite clear that the Legislative Assembly was never summoned four times a year or nearly so frequently. See Parry's 'Parliaments,' xiv., lv.

(*b*) Clarendon, 'History of the Rebellion.'

CHAPTER IV.

THE ACTS OF PARLIAMENT.

It has been shown that the original purpose of the summons of the Commons to Parliament was, that they might grant supplies to the Crown. When thus assembled, they took occasion to present petitions for the redress of grievances. The practice commenced near the beginning of the reign of Edward I., of entering the petitions with the King's answer on the *Parliament Rolls*, and from them, by the advice of the judges and others of the King's council, the Acts were after the dissolution of Parliament framed, and generally entered in a roll, called the Statute Rolls, and the tenor of them was affixed to proclamation writs, and directed by the sheriffs to be proclaimed as law in their counties(*a*).

The practice of leaving the statutes to be drawn up by the judges presented an opportunity of falsifying the intentions of the legislature, of which advantage was often taken(*b*). The Commons complaining of this practice, it was enacted, 8 Hen. IV., at their request, that certain of the Commons should be present at the engrossing of the Parliament Roll. This precaution, however, was found insufficient. The Commons, in the second year of Henry V., presented a strong remonstrance to the King, asserting that

(*a*) Ruffhead's 'Statutes,' preface, xii. Some earlier statutes are expressed to be founded upon petitions. Thus the Articuli Cleri, 9 Edw. II. stat. 1, are expressed to be according to the tenor of articles propounded by the Prelates and Clerks, and the answers made by the King and his Council.

(*b*) Hallam's 'Middle Ages,' ch. 8, part 3.

it had ever been the right of the Commons that there should be no statute made without their assent, and praying that no statute should be engrossed with additions or diminutions which should change the sentence and intent, asked by the Speaker's mouth on their petition in writing. And the King granted that nothing should thenceforth be enacted without their consent, saving the royal prerogative to grant or refuse their petitions(*a*).

The important principle was thus introduced into the English constitution, that the Crown must either assent to or reject bills in Parliament, but cannot modify them; and consequently, that it is indispensable to the authority of statutes that they be in form, as well as in substance, the concurrent Acts of the whole legislature.

Nevertheless the bill of 2 Hen. V. did not wholly remove the complaint that the statutes were improperly drawn up. Even where those whose duty it was to draw them up acted with perfect fairness, it was obviously very difficult to draw up from the petition and a modified answer(*b*) an Act which should accurately and completely express the will of Parliament. To remedy the evil, the practice was introduced or revived about the end of the reign of Henry VI.(*c*), of exhibiting bills in Parliament in the form of complete laws in the first instance, and this became thenceforth the established practice, and has so continued to the present time. The form of the enacting clause however varied from time to time, and the form now in use was not regularly adopted until the time of Charles II(*d*).

According to a form long adopted, statutes usually com-

(*a*) Ruffhead, preface, xv.

(*b*) The King's assent to the petition was not always simply expressed, but sometimes comprised provisions not contained in the petition. For instance, see the Petition and Answer given 1 Hatsell's 'Precedents,' p. 26.

(*c*) Ruffhead, xv.; Dwarris, 37.

(*d*) Ruffhead, pref. to 'Statutes,' p. xvi., says that the form now in use first occurs in 13 Charles II. stat. 2, c. 2. The form there is: "Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parlia-

mence with preambles, which state the occasion or purposes of the statutes. "The rehearsall or preamble of the statute," says Coke, "is a good meane to find out the meaning of the statute, and, as it were, a key to open the understanding thereof;" but though the preamble may assist in construing ambiguous expressions in a statute, it will not be allowed to control clear ones. Where a particular evil is pointed to by the preamble as being in the contemplation of the legislature, the remedy provided is frequently held to be applicable to other evils of like nature(*a*).

Of modern Acts of Parliament, the principal division is into *public* and *private;* and private Acts of Parliament are again divided into those which are *personal* and those which are *local.* The appellation 'statutes' is usually confined to public Acts of Parliament. Of these the judges are bound to take judicial cognizance; they are not bound to take notice of private Acts of Parliament unless they are formally stated in the pleadings. It has therefore often become a question in Courts of Law whether an Act is to be deemed public or private(*b*). For our present purpose it is sufficient to describe public Acts as those which relate to the kingdom at large, and private Acts as those which relate to particular classes or persons; though, as these latter, besides more

ment assembled, and by the authority of the same." Long before this, however, a form was frequently adopted which was substantially the same, and in which the Commons did not appear as petitioners. Thus in the statutes 23 Hen. VI. (A.D. 1444), the form is: "Nostre Seignur le Roi del advys et assent de les Seignurs Espirituelx et Temporelx et les Communes esteantz en le dit Parlement et par auctorite de mesme le Parlement, fist ordeigner et establier."

It is to be observed that the ordinary form of enacting bills now in use has not been adopted without some exceptions. Thus the Acts of Attainder and of Pardon, and private Acts, have peculiar forms. The most important instance of departure from the common form is in Acts imposing taxes. On the principle that aids and supplies to the Crown are the sole gift of the Commons, bills for these purposes are prefaced with words addressed to the Crown by the Commons, which are followed by the ordinary enacting clause.

(*a*) Co. Litt. 79 *a*; Dwarris on Statutes, 505.

(*b*) See Dwarris on Statutes, 464–5; Butler's Co. Litt. 98 *a*, note (1).

particularly relating to some classes, may indirectly affect the rest of the community, a question frequently arises as to their classification(*a*). Local Acts are those which affect particular places only, and relate principally to bridges, canals, docks, railways, and turnpike roads; with respect to these, various preliminaries relating to the deposit of plans and sections of the intended works, and other particulars, are by the standing orders of the two Houses of Parliament required to be observed by the promoters of the several bills. Personal Acts chiefly relate to the naturalization, names, estates, or divorces of particular persons. Thus estate bills are frequently required to facilitate leases, and sales of estates, where, from complications of the titles to them, or defective powers, or disabilities of the persons interested in them, the ordinary methods of legal conveyance would be ineffectual for the purposes intended. With respect to personal Acts also, various preliminary precautions are observed to prevent their being unduly passed.

Anciently, the Acts of each session were not divided into chapters with distinct titles, but the title used to be a general one for all Acts of the same session(*b*). The rule prevailed till comparatively recent times, that when an Act did not provide to the contrary, it was to be taken to operate from the commencement of the session in which it was passed. Consequently, where the session was a long one,

(*a*) In their passage through Parliament, bills for the benefit of private persons, etc., are subject to the payment of fees, and are all called private. After receiving the royal assent, acts are divided into—1. Public General Acts; 2. Local and Personal Acts declared public and to be judicially noticed; 3. Private Acts printed by the Queen's printer, and whereof printed copies may be given in evidence; 4. Private Acts not printed.

By 13 & 14 Vict. c. 21, s. 7, every Act of Parliament is to be deemed public, unless it expressly provides the contrary.

See as to the cases in which Acts are to be deemed private Acts for the purpose of paying fees, 2 Hatsell, p. 281.

(*b*) In 1 Blackstone's 'Commentaries,' p. 183, it is said this was the case until 1 Hen. VIII., but from other authorities it seems that the custom of prefixing titles to statutes existed in 4 Hen. VII., A.D. 1488, and there are instances earlier. (16 State Trials, 743 *n.*)

an Act which did not receive the royal assent until the close of the session, might have the effect of rendering illegal an act committed many months previously and lawful when it was committed. This cause of palpable injustice was remedied by the statute 33 George III. s. 13, which provides that every Act shall commence from the date of the royal assent to it, where no other date of its commencement is provided.

Certain Acts of Parliament are expressed to be of temporary duration, and some of these are annually succeeded by similar Acts. The annual Acts of the greatest constitutional importance are the Mutiny Acts and the Annual Appropriation Acts, the nature of which will be considered hereafter. Many statutes of temporary operation are kept in force from time to time by Continuance Acts. By 48 George III. c. 106, provision is made for the case of an Act happening to expire in any session previously to the passing of a Continuance Act in that session: it is provided that the latter shall (with certain exceptions) take effect from the expiration of the Act intended to be continued.

CHAPTER V.

THE LEGISLATIVE PREROGATIVES OF THE CROWN.

THE Sovereign has a limited legislative power apart from the two Houses of Parliament, to make or suspend laws. Besides this power, there are important royal prerogatives with respect to Parliament, to determine the duration of its sittings, to make various recommendations to it, to refuse assent to bills.

The legislative prerogatives of the Crown here to be considered relate to dispensing powers and similar powers, Royal Proclamations and Orders in Council.

The dispensing and suspending powers of the Crown have been thus defined:—"The dispensing power consisted in the exemption of particular persons, under special circumstances, from the operation of the penal laws; the suspending power, in nullifying the entire operation of any statute or number of statutes" (*a*). The very basis of the British Constitution being the legislative supremacy of Parliament, it is clear that the extent of the dispensing and suspending powers of the Crown is of fundamental importance. It is clear also that both kinds of powers are in effect nearly alike, for the reiterated effect of the dispensing power would be tantamount to an exercise of the suspending power.

We have seen, in a preceding chapter, that the right of the Commons to participate in the enactment of laws be-

(*a*) Amos on the English Constitution, 20.

came gradually established in the fourteenth century; but that, notwithstanding the recognition of this right, it was several times evaded in the reign of Edward I. and succeeding reigns. In the statutes of Edward I. we find a clause sometimes introduced saving the King's rights, by which he probably intended to reserve a right to dispense with the statutes, and this reservation seems to have been used as a means of extortion and injustice(*a*).

During the Plantagenet dynasty however the supremacy of Parliament was far more strictly maintained than in the time of their successors, the Tudors and Stuarts(*b*). The power of legislation given by statutes to Henry VIII.(*c*) was a direct infraction of the Constitution, which would never have been endured in the time of the Plantagenets(*d*).

The statute 1 James I. c. 3 recites the King's declara-

(*a*) See Dwarris on Statutes, 48, 50.

The following are examples of clauses saving the King's rights:—In the first Statute of Westminster, 5 Edw. I. c. 50,—"And forasmuch as the King hath ordained these things unto the honour of God and holy Church and the Commonwealth, and for the remedy of such as be grieved, he would not that at any other time it should turn to the prejudice of himself or his crown, but that such right as appertains to him shall be saved in all points." In 28 Edw. I. c. 20,—"And notwithstanding all these things before mentioned, or any point of them, both the King and his Council, and all they that were present at the making of this ordinance, will and intend that the right and prerogative of his crown shall be saved to him in all things."

(*b*) See Hallam's Const. Hist. vol. i. ch. 1.

(*c*) By 31 Hen. VIII. c. 8, the King, with the advice of his Council, might set forth proclamations under such pains and penalties as to him and them seemed necessary, which should be observed as though they were made by Act of Parliament, with an important limitation, that this should not be prejudicial to any person's inheritance, offices, liberties, goods, chattels, or life. By 34 Hen. VIII. c. 23, judgment might be given against any the offenders of the last-mentioned statute by nine of the King's Council. Both statutes were repealed in the first year of the following reign, 1 Edw. VI. c. 12, s. 5.

(*d*) In an isolated case, 15 Ric. II., the Commons assented that the King might, with the advice of the Lords, dispense with the Statute of Provisors, but reserved the right to disagree to such dispensation in the next Parliament; and protested that the course taken by them in this case was not to be drawn into a precedent. (12 State Trials, 375.)

tion that all grants and monopolies, and of the benefit of any penal laws, or of *power to dispense* with the law, or to compound for the forfeiture, are unlawful, and confirms and gives effect to that declaration. But the instances of the exercise of dispensing powers under the Stuarts are those of the greatest historical interest, because of the popular opposition which they provoked, and the steps taken in the subsequent reign of William III. to abrogate these powers. By the Bill of Rights, 1 W. & M., it was declared that from the then session of Parliament no dispensation with any statute should be valid unless such statute allows it, and except in such cases as should be specially provided for by the then present session.

The occasion of this excellent provision was the extravagant and unwarrantable exercise of the dispensing power by James II., especially in the case of Sir Edward Hales. He had rendered himself liable to the penalties of the Test Act, which prohibited Papists from holding certain offices, and, upon a prosecution against him, preconcerted by the King's instrumentality, the King's power of dispensing with the Act was judicially affirmed(*a*). James having thus procured the sanction of a judicial opinion to a dispensation with the Test Act, madly proceeded to a suspension of the principal laws for the support of the Established Church, to which excess several of the judges corruptly gave countenance(*b*).

(*a*) Bishop Burnet says this trial was a "piece of pageantry;" that pliable judges were previously chosen, and that the cause was purposely pleaded with indecent coldness. (History of his own Times, A.D. 1686.) Hume, in his 'History,' adverting to this case, treats it as clear that the dispensing power of the Crown had long been recognized by law, but that this power was necessarily abolished in William's reign as incompatible with the constitutional limitations of the Crown then introduced. The position adopted by Hume, that the dispensing power had been recognized by law, has been much controverted. For a large collection of precedents and references to the history of this controversy, see note to Butler's Co. Litt. 120 *a*, note (4); and the Report of the Trial of Sir Edward Hales, 11 State Trials, 1166; and the Trial of the Seven Bishops, 12 State Trials, 183.

(*b*) Butler's Co. Litt., *ubi supra*, where it appears that previously the dis-

In the attempts of James II. to indemnify beforehand against the consequences of penal laws, he only followed the examples of his predecessors of the Stuart dynasty. Thus, among other instances, Charles II., in 1662 and 1672, made a declaration against the execution of penal laws against Papists and Nonconformists. These declarations were, shortly after their publication, disapproved of by resolutions of the House of Commons(*a*).

Having thus considered the *negative* powers of the Crown to dispense with or suspend existing laws, we may pass to the consideration of the positive power of the Crown to proclaim new laws. We have seen that in the reign of Henry VIII. the Houses of Parliament abdicated their functions by a statute authorizing the King in Council to make proclamations, which, with certain limitations, should have the force of statutes, and that the authority thus given to the Crown was very shortly afterwards revoked. Parliament has never since given such powers to the Crown; but there have been efforts, in the time of the Stuarts especially, to assume such powers to the Sovereign.

In the reign of James I. a great struggle was made to increase the Royal prerogative of making proclamations. Lord Chancellor Ellesmere and Bacon encouraged these

pensing power was subject to great limitations. Among these were, that the King could not dispense with statutes prohibiting *malum in se*, but only those which prohibited *malum prohibitum*; and as to the latter, those only which were made for the King's profit, and not the general good. This view of the state of the law previously to the Bill of Rights agrees with what Coke says in the 3 Inst. 154:—"Where any Act of Parliament is made that disableth any person, or maketh anything void or tortious for the good of the Church or Commonwealth, in this law all the King's subjects have an interest, and therefore the King cannot dispense therewith, no more than with the common law. But where a statute prohibiteth anything upon a penalty, and giveth the penalty to the King, or to the King and the informer, there the King may dispense with the penalty, and this diversity is warranted by our books." See to the like effect, 1 Inst. 120 *a*.

(*a*) Burnet, A.D. 1662, 1672; and see the Proceedings in Parliament with respect to these declarations, stated in the case of the Seven Bishops, 12 State Trials, 376.

attempts, but Coke nobly resisted them, arguing that the King could not change any part of the common law, nor create an offence by proclamation which was not an offence before, and that there never was an indictment seen which concluded with a *contra regiam proclamationem*(*a*). In this reign the judges of the Court of Exchequer decided that impositions on exports and imports might be validly made by proclamation(*b*). This decision was immediately followed by the celebrated Petition of Grievances, addressed by the Commons to King James I., in 1610. In this remarkable document(*c*), the Commons distinctly tell the King that it is "the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in Parliament;" and that a multitude of illegal proclamations had been issued by the King, which tended to "bring a new form of arbitrary government into the realm"(*d*).

In the reign of Charles I. many proclamations were issued from the Council Chamber, and followed up by prosecutions and illegal judgments in the Star Chamber. In the celebrated Petition of Right which was addressed by the Commons to Charles I. in 1627(*e*), all sorts of taxes not

(*a*) This was A.D. 1610, in answer to the Privy Council, who required him to give an opinion as to the validity of proclamations prohibiting new buildings in and about London, and prohibiting the making starch of wheat. (12 Coke, Rep. p. 74; 2 Howell's State Trials, 723. See also 3 Coke, Inst. 162.)

(*b*) 2 State Trials, 371; the Case of Impositions.

(*c*) A copy of it is given 2 State Trials, 519.

(*d*) The speech of Sir Francis Bacon to the King, in presenting this petition, is in a different style. He prays the "excellent Sovereign, let not the sound of grievances, though it be sad, seem harsh to your princely ears. It is but *gemitus columbæ*, the mourning of a dove, with that patience and humility of heart which appertaineth to loyal and loving subjects," etc. (2 State Trials, 531.)

(*e*) In this Petition of Right, which was framed by Coke, every proposition condemnatory of the excesses of the king's power is carefully established by reference to statute law. (2 State Trials, 374.)

levied by the authority of Parliament are declared illegal. In 1640 the legislature crushed ship-money almost in its birth, by declaring that imposition and the judgment given against John Hampden, touching ship-money, to be contrary to law(*a*).

The reaction which led to the restoration of Charles II. was not accompanied by a surrender of the Parliamentary right of taxation. One of the first statutes of that reign anxiously recites that taxes cannot be imposed on imports or exports except by consent of Parliament(*b*). The issue of illegal proclamations was, however, by no means discontinued, though perhaps less frequent than in the preceding reign(*c*).

With respect to the prerogative of issuing proclamations, Blackstone remarks, that though the making of laws is entirely the work of a distinct part—the legislative branch—of the sovereign power, yet the manner, time, and circumstances, of putting those laws in execution must frequently be left to the discretion of the executive magistrates(*d*).

Proclamations in modern times are usually issued in pursuance of *Orders in Council*—that is, they promulgate orders made by the Sovereign by the advice of the Privy Council(*e*). These proclamations are of the following kinds:—(1) Proclamations authorized by Statutes. (2) Proclamations authorized by prerogative.

(1) In modern legislation it has been frequently found convenient in Acts of Parliament to leave the time and manner of putting them in force to be determined by the Queen in Council. Of this practice it will be sufficient to cite briefly one or two instances. By the Act 6 George IV. c. 78, extensive powers are given for making, by Or-

(*a*) 16 Car. I. c. 14. The proceedings respecting ship-money are further considered in a subsequent chapter.

(*b*) 12 Car. II. c. 4, s. 6.

(*c*) Amos on the Constitution, p. 25.

(*d*) Blackstone, Comm., ch. 7.

(*e*) The functions of that body are principally executive. These will be considered under the head of "Executive Government."

ders in Council, quarantine regulations. By the Act of 1835 for regulating Municipal Corporations, the Queen in Council may incorporate any town under the provisions of that Act. The Queen, by Orders in Council, may regulate the practice of her Vice-Admiralty Courts abroad; may put in force the Health of Towns Act, 1848; the International Copyright Act; the Acts relating to the Ecclesiastical Commission, and many others.

(2) The more important Orders in Council, with respect to their constitutional effect, are those which are authorized by royal prerogative. Many of these are of an administrative nature, and therefore will be noticed more particularly in another place. But many of the prerogative Orders in Council have a legislative character.

Thus, when war is proclaimed in pursuance of the executive prerogative, proclamations are usually issued, materially altering the ordinary laws relating to trade, and imposing rules for the conduct of trade with neutral and other states(*a*). A proclamation laying an embargo upon all shipping from leaving English ports for a limited period in time of war, is as binding, says Blackstone(*b*), as an Act of Parliament. Detention by embargo is incident to the royal prerogative of peace and war, and the sovereign may in time of war wholly forbid trade with the enemy, or limit it by certain conditions(*c*); but the power of the Crown to declare foreign ports to be in a state of blockade has been the subject of great controversy(*d*).

(*a*) *E.g.* an Order in Council of April 15, 1854, empowered British subjects, under certain restrictions, to trade with all ports and places not in a state of blockade, notwithstanding the existing war with Russia.

(*b*) 1 Blackstone, Comm., ch. 7.

(*c*) Maclachlen on Shipping, 477.

(*d*) The Orders in Council in 1807 and 1808, declaring France to be in a state of blockade, which were made in retaliation for the Milan and Berlin decrees of Napoleon I., declaring the British Islands and Colonies in a state of blockade, are now considered contrary to the laws of blockade. (Maclachlen on Shipping, 487, note.) See as to the history of these Orders, 'Edinburgh Review,' vol. xii. p. 225.

In cases of unforeseen emergency, Orders in Council have been issued in modern times temporarily suspending or modifying the existing laws; and the advisers of the Crown have taken upon themselves the responsibility of such orders, trusting to receive the subsequent indemnity of Parliament. Thus, in 1766, in consequence of an anticipation of scarcity, an Order in Council was issued, directing an embargo on vessels laden with wheat for exportation; and in the following session an Act of Indemnity(*a*) with respect to that order was passed. In 1797, the Bank of England, during money panic, was directed to suspend cash payments by a Minute of Council, which was subsequently the subject of an Act of Indemnity(*b*). During the latter part of the last century, and the first few years of the present century, various statutes(*c*) were passed indemnifying persons who had advised and acted under Orders in Council, contravening the laws regulating exports, imports, and navigation. These orders were made with reference to the exigencies of the wars in which this country was then engaged with France. The Orders in Council in 1807 and 1808 above adverted to, declaring France to be in a state of blockade, were the subject of an Act of Indemnity(*d*); and at a later date, an Order in Council authorizing the importation of corn in time of scarcity, in contravention of the existing corn-laws, was similarly ratified by Parliament(*e*). So late as the year 1858, in consequence of the suspension by the authority of the executive government of the Bank Charter Act of 1844, an Act(*f*) was passed to indemnify the Bank of England in respect of an issue of notes in contravention of the existing law.

The course of legislation just adverted to is a Parliamentary recognition of the principle that, in certain times of emergency and danger to the kingdom, the Crown properly anticipates the future action of Parliament by a temporary

(*a*) 7 Geo. III. c. 7.
(*b*) 37 Geo. III. c. 45.
(*c*) 53 Geo. III. c. 12, and previous statutes.
(*d*) 48 Geo. III. c. 37.
(*e*) 7 & 8 Geo. IV. c. 3.
(*f*) 21 Vict. c. 1.

suspension of certain classes of statutes. This principle is of course one liable to abuse in arbitrary hands, but seems to be established both by reason and authority.

In the judgment against Hampden, by which he was held liable to the payment of ship-money, the judges relied(*a*) on the principle that when the kingdom is in danger, the King, by writ under the Great Seal, may command his subjects to provide for and furnish ships for the defence of the kingdom; but this judgment, as we have seen, was vacated by Act of Parliament.

The officers and ministers of the executive government are liable in courts of justice to precisely the same consequences for their illegal acts as private persons. It would be vain to plead in an English court of law the King's command to do an unlawful act(*b*). Neither can the King pardon a private wrong(*c*), nor pardon an offence before it is committed(*d*). Those therefore who act under Orders in Council, such as we have been last considering, have no protection except that given them by Acts of Parliament of indemnity, and consequently it is clear that Parliament has an effectual control over such Orders in Council(*e*).

An important class of Orders in Council, of a strictly le-

(*a*) See preamble of 16 Car. I. c. 14.

(*b*) By 2 Edw. III. c. 8, and 11 Ric. III. c. 10, and other ancient statutes, no command under the King's seal shall disturb or delay justice; and the justices are to do right, notwithstanding any such command. See 1 Blackstone, Comm., 142.

(*c*) 4 Blackstone [398].

(*d*) Lindsay's Trial, 14 State Trials, 987.

(*e*) In 1692, a bill being brought into Parliament to indemnify the ministers of William III. for certain illegal commitments of suspected persons to prison, it was proposed to limit such commitments for the future by several rules, all which rules were rejected by the Commons. "They thought" (says Burnet) "those limitations gave a legal power to commit in cases where they were observed; whereas they thought the safer way was to indemnify the Ministry when it was visible they did not commit any but upon a real danger, and not to set them any rules; since, as to the committing of suspected persons, where the danger is real and visible, the public safety must be first looked to and supersede all particular laws." (Burnet, Hist., A.D. 1692.)

gislative character, is that of orders establishing constitutional forms of government in certain dependencies of the Crown. In certain of the Colonies and dependencies, constitutions cannot be established except by Acts of Parliament, while in others they can be established by the royal prerogative alone.

CHAPTER VI.

THE PARLIAMENTARY POWERS OF THE CROWN.

THE Parliamentary powers of the Crown relate to—(1) The Summons of Parliament. (2) The Opening the Session. (3) Proceedings in and Privileges of Parliament. (4) The Adjournment, Prorogation, and Dissolution of Parliament.

(1) No Parliament can be legally assembled without the authority of the Crown, and this rule (with the exception to be mentioned presently) applies as well to the original meeting of a new Parliament as to its reassembling after prorogation.

There are two remarkable instances in English History, of Parliaments, of which the authority has been acknowledged, which were avowedly(*a*) called together without the royal authority. The first was that of the Convention Parliament of 1660, which was summoned under the direction of an ordinance of the Long Parliament, and was declared to be validly constituted by an Act which received the royal assent in the same year, immediately after the accession of Charles II.(*b*). The other instance is the Convention Parliament of 1688, elected by virtue of letters-missive written

(*a*) "Surely none but the King can summon Parliament, and this is the reason that H. 4, having taken his liege lord, King Rich. 2, prisoner on the 20th day of August, anno 23, did cause the writs of summons for the Parliament wherein he obtained the crown to bear date the 19th day of the same moneth, and the warrant to be *per ipsum regem et consilium*, and himselfe to be summoned by the name of Henry, Duke of Lancaster." (Elsynge, 'Manner of holding Parliaments,' cap. 1.)

(*b*) 12 Car. II. c. 1.

by the Prince of Orange, which convention was declared to be the two Houses of Parliament by a statute passed on the accession of William III., and further confirmed by an Act of the next Parliament(*a*).

The law provides in one case(*b*) for Parliament meeting without summons from the Crown. It is provided by statute that Parliament shall not be dissolved on the death of the sovereign; but, if then sitting, shall continue six months longer, unless sooner prorogued or dissolved by the succeeding sovereign. If there be a Parliament in being at the death of the sovereign, but it happen to be prorogued or adjourned, it shall forthwith meet and continue for six months, unless sooner prorogued or dissolved. If the King die after the dissolution of a Parliament and before the day appointed for the meeting of a new Parliament, the last preceding Parliament shall meet and continue for the like period of six months. If the successor to the Crown die within those six months and before a new Parliament meets, the last Parliament continues for six months after the decease of the successor, but subject to be prorogued by the next successor. If the King die after the day appointed for the meeting of a new Parliament, that Parliament is to meet and sit for the like period of six months(*c*).

With respect to the time of calling and holding Parliaments, the prerogative of the Crown, which, by the ancient laws of the realm, was under no restraint, is now subject to statutory and constitutional limitations.

(*a*) 1 Will. & M. sess. 1, c. 1; 2 Will. & M. sess. 1, c. 1; Burnet, Hist. of his own Time, 1688; 2 Hatsell's 'Precedents,' 296. The Prince of Orange called together all the Peers and the members of the three last Parliaments who were then in London, and some of the citizens; and it was in this assembly that the issue of letters-missive by the Prince for convoking the Convention Parliament was agreed upon. (Burnet, *ibid.*)

(*b*) By a statute of Charles I. (16 Car. I. c. 1) it was enacted that if the King neglected to call a Parliament for three years, the Peers might assemble and issue out writs for choosing one; and in case of neglect of the Peers, the constituents might meet and elect one for themselves. This Act was repealed at the commencement of the next reign, by 16 Car. II. c. 1.

(*c*) 6 Anne, c. 7, ss. 4, 5; 37 Geo. III. c. 127, ss. 3, 4, and 5.

The course of legislation in this country shows that from a very remote period the Commons have been solicitous to secure the frequency of Parliaments. A statute of Edward III., in 1330, provided "that a Parliament shall be holden every year once, and more often if need be"(*a*); and a later statute of the same reign provides that "a Parliament shall be holden every year, as another time was ordained by statute." The words "if need-be," Blackstone remarks, "are so loose and vague, that such of our monarchs as were inclined to govern without Parliaments, neglected convoking them, sometimes for a very considerable period, under the pretence that there was no need of them(*b*).

An Act of Charles I., already noticed, for the preventing of inconveniences happening by the long intermission of Parliaments, made provisions for the assembling of Parliament without the Royal authority, if the King neglected to call Parliament for the space of three years. This Act was annulled as derogatory to the King's "just rights and prerogative inherent to the imperial crown of this realm," by an Act of Charles II.(*c*), which however enacts that thereafter the sitting and holding of Parliaments shall not be

(*a*) "Whereas many persons suffer delay in the King's Court of Justice—it is ordained that the King shall hold a Parliament once every year, or twice, if necessary." (5 Edw. II.; Parry's 'Parliaments,' 73.)

Ensement est accorde qe Parlement soit tenu chascun an une foitz ou plus si mestier soit, 4 Edw. III. c. 14; confirmed by 36 Edw. III. c. 10. In 50 Edw. III., the Commons petition that every year there may be held a Parliament, and the knights of counties may be elected by common election: "The King wills that they shall be elected by common assent of all the county." (Parry's 'Parliaments,' 135.) In 1 Ric. II., to a petition of the Commons to the King to hold a Parliament once a year, he answers, "Let the statutes be kept as to the meeting of Parliament." (Parry, 139.) 16 Car. II. c. 1, directs that Parliaments shall not be omitted for more than three years; 6 Will. & M. c. 2, directs that Parliaments shall not continue more than three years; Geo. I. st. 2, c. 38, directs that Parliaments may continue for seven years.

(*b*) Lord Northington led the House of Lords to adopt the sophistical construction that the words "if need be" governed the whole sentence, and that Parliament was not to be holden once in a year, except "if need be." (Amos on the Constitution, p. 47.)

(*c*) 16 Car. I. c. 1; 16 Car. II. c. 1.

intermitted or discontinued above three years at the most, but that within three years after the determination of each Parliament, or if there be occasion more often, the Crown shall summon another Parliament. This Act however makes no provision for the case of the King neglecting its observance, and accordingly was disregarded by Charles II.(*a*).

This Act of Charles II. made no provision for limiting the duration of Parliament, and the Long Parliament of that reign lasted eighteen years. But the Triennial Act of William III. limited the duration of Parliament to three years at the furthest, and at the same time repeated the provision that Parliament should be holden every three years at least. In the preceding sessions of Parliament a similar bill, originated in the House of Lords, was passed by both Houses, but rejected by the King. Burnet's remarks on this bill are worth quoting, as they contain the principal arguments for the frequent renewal of Parliaments. "Anciently, considering the haste and hurry in which Parliaments sat, an annual Parliament(*b*) might be no great inconvenience to the nation; but by reason of the slow methods of Sessions now, an annual Parliament in time of peace would become an insupportable grievance. A Parliament of a long continuance seemed to be very dangerous either to the Crown or to the nation; if the conjuncture and their proceedings gave them much credit, they might grow very uneasy to the Crown, as happened in King Charles the First's time; or, in another situation of affairs, they might be so practised upon by the Court that they might give all the money and all the liberties of England

(*a*) Mr. Amos says this Act was the repeal of a good law with good securities, and a mere re-enactment of it, with much parade and self-glory, but without any securities. (Amos on the Const., *ibid.*) The last Parliament held by Charles II. was that dissolved at Oxford in 1681. At the end of the third year from that time he refused to call another Parliament, there being, as Burnet remarks, no enforcing clauses in the Act in question. (Burnet, Hist. A.D. 1684.)

(*b*) Parliaments were annually renewed, with comparatively few exceptions, from 23 Edw. I. to the reign of Henry VIII. See Parry's 'Parliaments,' lv.

up, when they were to have a large share of the money and were to be made the instruments of tyranny, as it was likely to have been in King Charles the Second's time. It was likewise hoped that frequent Parliaments would put an end to the great expense candidates put themselves to in elections; and that it would oblige the members to behave themselves so well, both with relation to the public and in their private deportment, as to recommend them to their electors at three years' end; whereas when a Parliament was to sit many years, members covered with privileges were apt to take great liberties—forgot that they represented others, and took care only of themselves"(*a*).

Lastly, by an Act of George I.(*b*) for enlarging the time of continuance of Parliaments, and generally known as the Septennial Act, it was enacted that the then present Parliament and all subsequent Parliaments shall continue seven years and no longer, unless sooner dissolved.

The duration of Parliaments is generally much less than seven years. The first Parliament of the United Kingdom of Great Britain and Ireland met in 1801. The Parliament of the year 1862 is the eighteenth Parliament of the United Kingdom; so that the average duration of each Parliament since the Union has been between three and four years. The duration of Parliament in several of the British Colonies is limited to five years.

Since the repeal of the last-mentioned Act of Charles I. no provision has been made by Act of Parliament for convocation of Parliament in case the Crown shall not summon it within the period required by law. But on several occasions petitions and addresses have been presented to the Crown with respect to the prerogatives of dissolving and summoning Parliament. Thus, in 1678, Parliament, which had been prorogued for a year and some months, addressed the King, Charles II., desiring him to dismiss the ministers who advised the prorogation(*c*). In the following

(*a*) Burnet, Hist. of his own Time, A.D. 1693.
(*b*) 1 Geo. I. st. 2, c. 38. (*c*) Burnet, A.D. 1678.

year petitions were sent from different parts of the country for a new Parliament, and a proclamation was issued by the King against such petitions(*a*). Towards the close of the reign of William III., the House of Commons being then very unpopular, numerous petitions were presented to the King from the people, praying for a new Parliament. A dissolution soon followed, and in the new House of Commons, complaints being made of the petitions against the former Parliament, resolutions were passed justifying the petitions(*b*). The right of addressing the Crown for or against the dissolution of Parliament has been repeatedly exercised in modern times(*c*).

The great security however for the regular meeting of Parliament consists in this: that some of the most necessary powers of the executive government are conferred by Parliament, by Acts which are required to be renewed annually.

Thus grants of public money are required to be annually made by Parliament to meet the expenses of the State. In ancient times the hereditary revenues of the Crown were so large as to render the ordinary royal expenditure to a considerable extent independent of Parliamentary supplies. But, by improvident alienations and mismanagement, the hereditary revenues(*d*) became so reduced, that ever since the discontinuance of illegal taxation in the time of Charles I., the Crown has been mainly dependent on Parliament for supplies. The practice of granting supplies always for limited periods did not however become established until after the Revolution of 1688. Previously to that time the revenue of Charles II., says Hume, as settled by the Long Parliament, was put upon a very bad footing. It was too small if they intended to make him independent

(*a*) Burnet, A.D. 1679. (*b*) *Id.* A.D. 1701.

(*c*) In 32 Charles II., A.D. 1680, the Commons resolve that "it is, and ever hath been, the undoubted right of the subjects of England to petition the King for the calling and sitting of Parliaments, and for redressing all grievances." (Parry's 'Parliaments,' 591.)

(*d*) The nature of these will be considered in a subsequent chapter.

in the common course of his administration; it was too large and settled during too long a period if they resolved to keep him in entire dependence(*a*). In the next reign of James II. the revenue was granted for life, and with great profusion. The King, in his first speech to Parliament, said to them, "Some might think the keeping him low would be the surest way to have frequent Parliaments; but they should find the contrary, that the using him well would be the best argument to persuade him to meet them often"(*b*). Parliament relied on the King's promise, and was never summoned by him after the first year of his reign. The House of Commons gave his successor, William III., the customs and other branches of revenue for five years, on the ground that a revenue for a certain and short time was the best security that the nation could have for frequent Parliaments. Burnet relates how he endeavoured to overcome the King's repugnance to this limitation of the revenue, by urging "that the people were not jealous of him, but of those who might succeed him; and if he would accept the gift for a term of years, and settle the precedent, he would be reck-

(*a*) 8 Hume, Hist. of England, 324.

(*b*) Burnet, Hist. of his own Time, A.D. 1685; 8 Hume, Hist., 221.

In no instance since the Revolution of 1688 have the Commons, by refusing the supplies, endeavoured to coerce the other powers of the State; the demands of the Crown for the public service have been complied with, and the annual estimates voted, without any deductions but a few of insignificant amount. But on several occasions Parliament has been moved to delay supplies; and in one instance, in 1784, the Commons exercised their power of delaying supplies—the majority being opposed to Mr. Pitt's government; but in the course of a few weeks the majority against him was so much reduced that the supplies were voted. (May's 'Constitutional History,' 70, 472, where it is said that the instance of 1784 was a solitary instance; but probably the observation is meant to be confined to modern times.) During a dispute in Queen Anne's reign, A.D. 1705, between the Lords and Commons about the "Aylesbury Man," the Lords, who had the money bills, would not pass them until the discussion had terminated. (Burnet, A.D. 1705.)

Before the Revolution, supplies were refused in many instances. In 1678 Charles II. sent a message to the House of Commons for an additional revenue of £300,000 during life, which, upon debate, was rejected without a division. (Burnet, A.D. 1678.) Charles had previously received money from the French king when Parliament refused supplies. (Burnet, A.D. 1677.)

oned the deliverer of succeeding ages as well as the present" (*a*).

Before the Revolution, the doctrine that grievances should be considered before supplies was frequently insisted and acted upon. Thus, in 12 James I., A.D. 1614, it was said in the House of Commons there had been no instance for twenty-five years of "any mention at a beginning of a Parliament of subsidies, except one, when *Hannibal ad Portas.*" Again, in 18 James I., it was said in the House of Commons, "supply and grievances may go hand in hand;" and Sir Edward Coke moved for a committee of grievances, urging that the remedy of them would encourage the House to increase the supply. In 1 Charles I., the Commons proceeded in the consideration of grievances and postponed supply, and thereupon Parliament was dissolved. In 4 Charles I., the King sending a message to hasten the supply, the Commons agree "that it is their ancient custom to consider grievances before matters of supply." A very remarkable illustration of this principle occurred in that year, for by a message, June 10, 1628, he consents to prolong the sessions, "so as the *Petition of Right* and the subsidy may go hand in hand together" (*b*).

The annual meeting of Parliament is also secured by the necessity of passing the Acts known as the *Mutiny Acts* (*c*), by the sole force of which a standing army is authorized and maintained. Of the nature of these Acts, a more particular statement will be given hereafter; for the present, it is sufficient to observe that the practice of rendering the Crown dependent on Parliament for the annual renewal of its powers, with respect to the army, was (like the annual grant of supplies) established after the Revolution of 1688. The first (*d*) of

(*a*) The procedure of Parliament, with respect to grants and the appropriation of public money, will be considered in a subsequent chapter.

(*b*) See Parry's 'Parliaments,' under the respective dates.

(*c*) 'An Act for punishing Officers and Soldiers who shall mutiny or desert their Majesties' service, to continue till November, 1689, and no longer:' 1 Will. & M. sess. 1, c. 2.

(*d*) 1 Will. & M. sess. 2, c. 2. The Parliamentary control over the standing army seems to have been as distasteful to William III. as the

the annual Mutiny Acts was passed immediately after the accession of William and Mary; and the Bill of Rights of the first year of their reign declares that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.

The manner of summoning Parliament remains to be considered.

The writs for the summons of a new Parliament are issued out of the Crown Office in Chancery. Upon a dissolution of Parliament by proclamation, which is the ordinary method of dissolving, the proclamation states that orders have been given to the Lord Chancellor forthwith to issue writs for the calling together a new Parliament. The Queen, with the advice of her Privy Council, by warrant under her hand, directs the Lord Chancellor to cause writs to be issued under the Great Seal, returnable on a day named in the warrant, and the writs are made out by the Clerk of the Crown in Chancery(*a*).

Fresh writs of summons are issued to the Peers, as well as for the election of the House of Commons, for every new Parliament(*b*). In order to give every member of Parlia-

Parliamentary control of the supplies has been shown to have been. He kept up an army for several years beyond the votes of Parliament; and it was not until after a vote of the House of Commons for the reduction of the army, a message from the King thereupon, begging the House to allow the Dutch Guards to remain, and a firm reply from the Commons, that the illegal force was disbanded. (Burnet, A.D. 1698.)

In 1784, during a contest between the King's ministers and the majority in the House of Commons, the Mutiny Bill was postponed for some days, as its passing was expected to be the signal for an immediate dissolution, and the interval was employed in an effort to drive the Ministers from office. (May's 'Constitutional History,' 65.)

(*a*) Clerk, 'Law and Practice of Elections,' p. 1. The warrant had been sometimes *per breve de privato sigillo*, but commonly *per ipsum Regem*, or *per ipsum Regem et Consilium*. (Elsynge, 'The Ancient Method and Manner of holding of Parliaments,' ch. 1.)

(*b*) Macqueen, 'Appellate Jurisdiction of the House of Lords,' 19 *n*. Besides these writs for Members of Parliament, writs are also addressed at every new Parliament to those judges and law officers who are "assistants" of the House of Lords. These "assistants" have no legislative power, and their principal duties are connected with the judicial functions of the House of Lords. *Ibid.* 35; see *infra*, book i. c. 7.

ment an opportunity of being present at the opening of the sessions, it is requisite that there be a due notice of the time and the place of meeting. Accordingly, in the original Constitution of Parliament, it was provided by the Charter of King John that summons should be made for a certain day, at the end of forty days at least, and to a certain place. By a modern statute, when the first meeting of Parliament after a dissolution is appointed by proclamation, the time to be appointed may be any time not less than thirty-five days after the proclamation(*a*).

The new Parliament meets at the return day of the writ, if it be intended that Parliament should meet for *dispatch of business;* otherwise the practice is to prorogue Parliament by a writ of prorogation, which is read in the House of Lords on the day on which the writs of summons are returnable: and this may be followed by further prorogations(*b*).

In order to assemble Parliament at short notice in case of necessity, it is provided(*c*) that a Parliament which has been prorogued to a certain day may, whenever the King pleases, by advice of the Privy Council, be convened earlier for dispatch of business by a Royal proclamation, giving not less than fourteen days' notice. The same provision was extended by 39 and 40 George III. c. 14, to the case of an adjournment of Parliament.

(2) *The Opening of the Sessions.*—Upon the assembly of Parliament, the Queen meets them either in person or by representation, without which there can be no beginning of Parliament(*d*). At the beginning of a new Parliament, and

(*a*) 15 & 16 Vict. c. 23. (*b*) 2 Hatsell, 303 *n.*

(*c*) 37 Geo. III. c. 127. Other statutes—26 Geo. III. c. 107, ss. 95, 97; 42 Geo. III. c. 96, s. 147—empowered the King to summon Parliament, after fourteen days' notice, when it stood prorogued or adjourned to a remoter time, in case of rebellion or invasion, and the enrolment of the militia.

(*d*) 1 Blackstone, Comm., 153.

In 1789, and again in 1811, when the mental incapacity of George III. prevented him from authorizing a Commission in the usual way for opening

at the commencement of every session after a prorogation, the cause of the summons must be declared to both Houses assembled, either by the sovereign in person, or by persons authorized by Royal Commission, before either House can proceed upon any business(*a*). On the first day of a new Parliament, the Commons, assembled in the House of Lords, are informed by the Lord Chancellor that the cause of summons by the Crown will be declared as soon as the members of both Houses are sworn, and a Speaker of the House of Commons chosen. But in every other session than the first, as there is no election of a Speaker, and no general swearing of members, the session is opened at once by the Royal speech(*b*). This speech is delivered either by the sovereign in person, or by commissioners appointed by Royal Commission. Anciently, the cause of summons was declared by the Lord Chancellor, or by the Lord Chief Justice in some cases (as where the Chancellor was a bishop, and the causes of summons were matters in which the clergy were canonically precluded from taking part), by the King's commandment, without any formal commission(*c*).

Parliament, the Lord Chancellor was authorized by resolution of both Houses to affix the great seal to the Commission. (May's 'Constitutional History,' vol. i. p. 155, 178.)

(*a*) 2 Hatsell, 'Precedents,' p. 307.

(*b*) In each House some bill is usually read before the Royal speech is taken into consideration, as the Houses of Parliament assume a right to proceed without reference to the causes of summons declared by the Crown. (2 Hatsell, 308; Rules and Orders of the House of Commons, 34.)

(*c*) Elsynge, ch. 6.

The following account of the manner in which a Parliament, 11 Ric. II., A.D. 1388, was opened nearly five hundred years ago, serves to show how retentive Parliament is of many of its ancient usages:—"The clergy then placing themselves on the right-hand and the nobility on the left-hand of the King, according to the ancient custom of the High Court of Parliament, the Lord Chancellor, standing with his back towards the King, by the King's command declared the cause of their summons to Parliament, which was to consider by what means the distraction of the realm, through evil management, might for the future be composed, the King better advised, the nation better governed, misdemeanours more severely punished, and good men more encouraged; how the kingdom also might be best defended, the sea best kept, the marches of Scotland securely guarded, Guyenne preserved; and, lastly, how the charges of these things may most easily be borne; and

(3) The powers of the Crown with respect to proceedings in, and privileges of, Parliament.

It has been already noticed that at the commencement of each sessions of Parliament, the cause of its summons is declared in a Royal speech. In this speech it is usual to direct the attention of the legislature in general terms to those public affairs which the sovereign is advised to invite Parliament to take into consideration. Besides this general recommendation to Parliament of subjects for its consideration, the sovereign is not further concerned in the initiation of Parliamentary measures, except in certain cases where those measures specially affect the rights and prerogatives of the Crown.

Where the Crown is interested as a party in any bill in Parliament, as patron of a living, lord of a manor, or the like, it is necessary that at some stage of the bill the consent of the Crown should be signified; and if the interest of the Crown be important (as in any measure to affect its hereditary revenue), the consent should be received at the earliest stage. A bill which interferes with the Royal patronage cannot be proceeded with unless such consent be given(*a*).

The purport of some bills must be communicated to the King even before they are presented, as bills for reversal of attainder and for restitution in blood, or bills for granting honours or precedency(*b*). A bill for a pardon is first signed by the Crown, and has only one reading in each House(*c*).

But the rule of most general importance with respect to the recommendation of bills by the Crown, is that which relates to Bills of Supply. By a standing order of the House of Commons, the House "will receive no petition for any

then gave notice that whoever would complain in Parliament of such things as could not well be redressed by the common law, might carry their petitions to the Clerk in Chancery there named and appointed to receive them." ('Proceedings against Nevil, Archbishop of York, and Others.' 1 State Trials, 100.)

(*a*) 2 Hatsell, 357; Bourke, 'Parliamentary Precedents,' 2nd ed. p. 120.

(*b*) Hatsell, *ubi supra*. (*c*) 3 Hatsell, 69.

sum of money relating to the public service but what is recommended from the Crown," and this rule is applied to all motions whatever for grants of money(*a*). The recommendation comes from the Crown by speech or message, and where the Committee of Supply (the functions of which will be considered more particularly hereafter) has closed, and subsequently in the session a further vote of public money has been required, the same form of recommendation is observed as at the beginning of a session(*b*).

Almost the sole exception that is admitted by the practice of the House of Commons to this rule is, when they address the Crown to apply public money to a particular purpose, and give assurance that the money so applied shall be repaid out of the grants of the sessions. This practice has been generally confined to small sums and services, the amount of which cannot be immediately ascertained(*c*).

There are various occasions on which the Crown communicates with the Houses of Parliament by written or oral messages, delivered by some member who is in the service of the Crown. The latter form of communication has been used when either House is informed of circumstances affecting its privileges, as the arrest of a member at the instance of the Crown(*d*). But when the object of the message is to desire any proceeding on the part of Parliament (as for the augmentation of the army or navy, a supply of credit, the payment of the debts of the civil list, etc.), the message is usually in writing, under the Royal sign manual. Such messages are usually communicated to both Houses on the same day(*e*).

"These messages," says De Lolme, "are always expressed

(*a*) 3 Hatsell, 195. (*b*) *Ibid.* 168.

(*c*) 3 Hatsell, 177. See also the part of the present work relating to Supply.

(*d*) Parliament is entitled by privilege to receive information of the imprisonment or detention of any member, with the reason for which he is detained,—a practice used on the slightest military accusation, preparatory to a trial by Court Martial, and on other occasions. See 1 Blackstone, 166.

(*e*) 2 Hatsell, 364.

in very general words; they are only made to desire the House to take certain subjects into their consideration; no particular articles or clauses are expressed; the Commons are not to declare at any settled time a solemn acceptance or rejection of the proposition made by the King; and, in short, the House follow the same mode of proceeding with respect to such messages as they usually do in regard to petitions presented by private individuals. Some member makes a motion on the subject expressed in the King's message, a bill is framed in the usual way, it may be dropped at any stage of it, and it is never the proposal of the Crown, but the motions of some of their own members, which the House discuss, and finally accept or reject" (*a*).

The House of Commons has, from a very early period, shown extreme jealousy of Royal interference with its proceedings, and for freedom of debate.

From a remote period it has been customary for the Speaker of the House of Commons, on being chosen, to be presented to the King in the House of Lords, and there make petition for the ancient privileges of the Commons, including freedom of speech (*b*). So early as 2 Hen. IV., A.D. 1400, we find the Commons praying the King that he will not give any hearing or belief in relation to matters moved in the Commons until there determined and agreed upon; and the King assents to that prayer (*c*). The right of the Commons was however liable to invasion in arbitrary times. In the twentieth year of Richard II., Thomas Haxey, a member of the House of Commons, having complained there of the excessive charges of the King's household, was thereupon adjudged in Parliament to suffer death as a traitor; but on the accession of Henry IV. the judgment was annulled (*d*). In the fourth year of Henry VIII., one

(*a*) De Lolme on the Constitution, book ii. ch. 4.

(*b*) Rules and Orders of the H. of Com., 17. Elsynge, ch. 7, says the Speaker's petition for freedom of speech is not recorded before 33 Hen. VIII.

(*c*) 2 Hatsell. And a little later in the same reign (5 Hen. IV.) a like petition received a similar answer from the King. (Dwarris on Statutes, 123.)

(*d*) 3 State Trials, 297.

Richard Strode, a member, having been fined by a local court, on account of a bill proposed by him in Parliament, an Act was passed annulling all suits, etc., against him and "every other person or persons afore specified, that now be of this present Parliament or that of *any Parliament* hereafter shall be, for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament" (*a*).

Instances of the Crown's interference with the fundamental privilege of freedom of Parliament occurred in the two succeeding reigns; but the Commons were in general successful in resisting these invasions of their privilege (*b*). The case of Sir Edwyn Sandys, *temp.* James I., A.D. 1621, is chiefly memorable on account of the celebrated protest of the House of Commons against the doctrine advanced by the King, that their privileges were not an undoubted right and inheritance, but rather derived from the grace and permission of the Crown. The House, with the assistance of Coke, Noy, and Glanville, prepared a protest, asserting the privileges of Parliament to be the right of the people, and that in the subjects of debate "every member of the House hath and ought to have freedom of speech." This protest, entered of record on the journals of the House, the King subsequently cancelled with his own hand (*c*).

The great case however which settled the right of Parliament to freedom of speech, and which has never since been directly impeached, is that of the proceedings against Sir John Elliot, Hollis, and Valentine, for seditious speeches in Parliament, 5 Charles I., A.D. 1629. To an information in the King's Bench, charging these members, among other things, with uttering seditious speeches in Parliament with respect to tonnage and poundage, they pleaded that the offences were supposed to be done in Parliament, and ought not to be punished elsewhere. The Court of King's Bench

(*a*) 3 State Trials, 318.

(*b*) See Strickland's case, 1 Hatsell, p. 83, and the other cases cited in that volume, ch. 2.

(*c*) 1 Hatsell, 79.

held that the plea to its jurisdiction was insufficient(*a*), and, the defendants refusing to make any further defence, condemned them to fine and imprisonment. In 1641 the House of Commons passed resolutions condemnatory of these proceedings, and awarded pecuniary compensation to the defendants. In the reign of Charles II., A.D. 1667, both Houses of Parliament agreed to resolutions that the Act of Parliament above-mentioned, 4 Henry VIII., relating to Strode's case, is a general law declaratory of the ancient and necessary rights and privileges of Parliament, and that the judgment against Elliot and the others was illegal. Finally, that judgment was brought before the House of Lords by a writ of error, and reversed, in 1668(*b*).

By the Bill of Rights(*c*), enacted in the first year of William and Mary, "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Charles I. on several occasions interfered with the freedom of debate in Parliament. In 1641, in a speech to both Houses, he adverted to a bill then depending about the impressment of soldiers; and thereupon the House resolved that their privileges were broken by the King taking notice of a bill that is passing; and the records contain numerous resolutions continued until modern times to the like effect(*d*). Charles II. frequently attended the debates in the House of

(*a*) On the ground that the Parliament being ended, an offence against the Crown committed in Parliament is punishable in another court.

(*b*) 3 State Trials, 293.

(*c*) 1 Will. & M. sess. 2, ch. 2, art. 9.

George III., during the American War, endeavoured to influence votes in Parliament by expressing his personal resentment against all who did not support his measures, and dismissing several members who held offices under the Crown from their offices. Thus military members of the House of Commons were dismissed from their commands of regiments, peers from their lord-lieutenancies, etc. This policy was loudly complained of in Parliament, and at last abandoned by the King. (May's 'Constitutional History,' ch. 1.) In 1783 the House of Commons passed a resolution condemning the report of the King's opinions upon proceedings in Parliament. (*Ibid.* p. 59.)

(*d*) 2 Hatsell, 352.

Lords, partly for amusement, and partly to solicit votes. On his first appearance during a debate, he stated that he was come to renew a custom of his predecessors, long discontinued. William III. and Anne(*a*) also occasionally attended the debates in the House of Lords; but since the reign of the latter the practice has been discontinued of the sovereign attending Parliament, except officially to pass bills, or speak from the throne to both Houses(*b*).

We have, lastly, to consider the functions of the sovereign with respect to the Royal assent to bills in Parliament.

A bill does not become an Act of Parliament until it has received the Royal assent; and with the exception (already mentioned) of an Act of Grace or Pardon, all bills pass through both Houses of Parliament before they are offered for the Royal assent.

To withhold offering for the Royal assent any bill that has so passed would be an infringement of the rules of Parliament. In 1680, Charles II., feeling objections to one of the bills which, on the day of prorogation, ought to have been offered him, privately directed the Clerk of the Crown to withdraw the Bill. In the following year the House of Commons pronounced this proceeding a gross violation of the Constitution of Parliament(*c*).

The Royal assent may be given in two ways:—first, in person, when the sovereign comes to the House of Lords in state, and sends for the Commons to the bar, when the titles of all the bills that have passed both Houses are read. To a Public Bill the form of assent is *le roy le veult*, the King wills it. To a Bill of Supply, *le roy remercie ses loyaux sujets, accepte leur benevolence et aussi le veult.* The form of dissent is (or was) *le roy s'avisera*—the King will advise thereon(*d*).

(*a*) Burnet, A.D. 1705. (*b*) 2 Hatsell, 371 *n.* (*c*) *Ibid.* 345.
(*d*) 1 Blackstone, Comm., 185.

Direct assent is essential to the validity of a statute. The first answer of Charles I. to the Petition of Right, A.D. 1628, was, "The King willeth that right be done according to the laws and customs of the realm; and that the statutes be put in due execution, that his subjects may have no cause to

The second method of giving the Royal assent is by commission. The letters-patent for the purpose recite—"whereas we have seen, and perfectly understood, an Act agreed upon by you," etc., and therefore cannot be granted until the bills have passed both Houses. Lord Clarendon says, that when it was proposed on Charles I. going to Scotland, in 1641, that he should have a commission with some persons to pass such Acts as should be agreed to by both Houses, it was found that no such commission could be legally granted to give the Royal assent to any Acts that were not assented to by both Houses at the date of the commission (*a*).

The right of the Crown to give the Royal assent by commission is declared by the statute 33 Hen. VIII. c. 21, by which it is declared "That the King's Royal assent, by his letters-patent, under his Great Seal, and signed with his hand, and declared and notified in his absence to the Lords Spiritual and Temporal, and to the Commons assembled together in the high House, is, and ever was, of as good strength and force as though the King's person had been there personally present, and had assented openly and publickly to the same" (*b*).

The form of the commission, as we have just seen, implies

complain of any wrong or oppressions contrary to their just rights and liberties, to the preservation whereof he holds himself in conscience as well obliged as of his prerogative." The Commons, dissatisfied with this, petitioned for a "clear and satisfactory answer." The second answer was,—

"Soit droit fait come il est désiré par la pétition.—C. R."

The King adding in his speech to Parliament at the same time, that this was no more than he granted by his first answer. (3 State Trials, 224, 230.)

In the House of Commons, 20th June, 1628, Mr. Selden said,—"For Public Bills the King saith, 'Le roi le veult;' for Petitions of Right, 'Soit droit fait comme il est désiré;' for the Bills of Subsidies, 'The King heartily thanketh the subjects for their good-wills.'" (Parry's 'Parliaments,' 325.) D'Ewes, speaking of the practice in the reign of Elizabeth, says the form of assent to a public bill was, *La Roigne le veult*, and to a private bill, *Soit faite come il est désiré*. (D'Ewes, 'Journals of all the Parliaments during the reign of Queen Elizabeth,' pp. 35, 76, 116.)

(*a*) Hist. of the Rebellion, vol. i. book iii.

(*b*) This is the third section of the Act of Attainder of Queen Katharine. The Act is not on the roll.

that there is a real assent on the part of the Crown to each bill to which the commission relates. This assent was however dispensed with in the case of the Regency Bill of 1811, to which the Royal assent was given by commission during the mental incapacity of George III. In that case, resolutions were agreed to by both Houses of Parliament, authorizing the issue of letters-patent under the Great Seal for giving the Royal assent by commission(*a*). The Act of Hen. VIII., just cited, requires the signature of the letters-patent by the King's own hand. George IV., in his last illness, was enabled by statute to dispense with this requisition, and to cause his signature to be affixed by a stamp(*b*).

The exercise of the Royal prerogative of refusing assent to bills passed both Houses had become rare before the Revolution of 1688, and has been wholly discontinued since the reign of Queen Anne. When William III. rejected, in 1693, a Bill for Triennial Parliaments, he excited great dissatisfaction by having recourse to an almost obsolete prerogative(*c*). The last occasion on which it was exercised was in 1707, when Queen Anne refused assent to a Bill for settling the militia of Scotland(*d*).

In later times, no occasion of withholding the Royal assent has occurred, because the Crown acts under the advice of ministers responsible to Parliament, and those ministers do not offer measures to Parliament in opposition to the will of the Sovereign. Thus, in 1766, when the ministers of George III. thought it necessary to propose to Parliament a measure to which the King was opposed—the repeal of an Act(*e*) imposing stamp duties in America—they took care to procure the King's previous consent to the passing of

(*a*) May, Constitutional Hist., 178. (*b*) 11 Geo. IV. c. 23.

(*c*) Burnet, Hist. of his own Time, A.D. 1693. The House of Commons, in a humble representation to the King, referred to this and two previous instances of the refusal of the Royal assent by him, represented that this course was unusual, and censured those who had advised it. (2 Hatsell, 342, 441.) The Royal assent was refused by William III. in 1696, and again (to a local bill) in 1701. (2 Hatsell, 342.)

(*d*) 2 Hatsell, 346 *n*.

(*e*) 5 Geo. III. c. 12, repealed by 6 Geo. III. c. 11.

the bill(*a*). Similarly in the reign of George IV., the ministers, knowing the King's repugnance to "Catholic Emancipation," before introducing into Parliament a Bill for relieving Roman Catholics from certain disabilities, obtained from the King his promise to assent to that measure(*b*). The House of Commons, by withholding supplies to the Crown, could always compel either a change of ministry or a dissolution of Parliament; and although the extreme measure of withholding supplies is never resorted to in modern times, the power of the House of Commons is so great, that ministers, to whose continuance in office that House declares itself opposed, must always resign their offices or appeal for support to a new Parliament. If the Ministers of the Crown do not possess the confidence of the House of Commons, they may appeal to the people, with whom rests the ultimate decision(*c*).

That the several enactments of Parliament should receive the Royal assent will appear very clearly, if we consider the nature of the coronation oath. By the Act for establishing the Coronation Oath(*d*), the King or Queen is to swear at coronation "to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in Parliament agreed on, and the laws and customs of the same." Thus, after taking that oath, the Sovereign, by the Royal assent to each subsequent statute, becomes conclusively bound to its observance.

(4) The Adjournment, Prorogation, and Dissolution of Parliament.

(*a*) May, Constitutional Hist., p. 32. (*b*) *Ibid.* p. 114.

(*c*) Lord John Russell's 'Memorials and Correspondence of Charles James Fox,' vol. ii. p. 245.

(*d*) 1 Will. & M. sess. 1, c. 6. The Act recites that "by law and ancient usage of this realm, the Kings and Queens thereof have taken a solemn oath upon the evangelists at their respective coronations to maintain the statutes, laws, and customs of the said realm," etc.

Prynne, in the second part of his 'Signal Loyalty and Devotion of God's True Saints and Pious Christians (as also of Idolatrous Pagans) towards their Kings,' p. 255, has given various forms of the Coronation of ancient English Kings, and their Coronation Oaths.

An adjournment is no more than the continuance of the session from one day to another, and is made by each House independently of the other; and after adjournment the business of the session may be proceeded with from the stage in which the adjournment left it(*a*).

A prorogation is made by the Crown and affects both Houses alike, and puts an end to all business then in progress in either House of Parliament (excepting certain proceedings of a judicial nature, and proceedings relating to private Acts of Parliament)(*b*).

Formerly there were many instances of the Houses adjourning at the expressed desire of the King, but the practice of so adjourning has been discontinued. Blackstone says(*c*) the Houses have always complied with the King's desire for an adjournment; "otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow, which would often be very inconvenient to both public and private business." But the House of Commons has certainly ever since the reign of James I. insisted that the King has not a right to adjourn Parliament without ending the session, and the practice has been for the House to adjourn itself for the period mentioned in the Royal message. James I. claimed the right of adjourning Parliament without ending the session. The claim was much debated in both Houses, and the opinions of the judges were taken upon it. Coke and others in the House of Commons insisted on the right of that House to adjourn itself, which it did accordingly(*d*). The ground taken by the House was,

(*a*) 1 Blackstone, c. 2.

(*b*) *Ibid.* The exceptions include Appeals in the House of Lords, Impeachments, and certain proceedings in Divorce Bills. (Dwarris, 257; 2 Hatsell, 335.)

(*c*) 1 Blackstone, Comm., ch. 2. A prorogation must be expressly made, though formerly it was considered that the Royal assent to any bill determined the session, unless (as was often the case) the bill provided to the contrary. (*Ibid.*; 2 Hatsell, 348.)

(*d*) Parry's 'Parliaments,' 284 *et seq.*; 2 Hatsell, 311 *et seq.* Mr. Amos observes that the power of adjournment, if assumed by the Crown, might be used for sinister purposes, especially if the adjournment were protracted

that an adjournment by the King is equivalent to a prorogation, and determines the session and its proceedings. It is clear that in arbitrary times the Crown might prefer to postpone inconvenient debates in one of the Houses of Parliament by means of an adjournment, rather than by a prorogation which would affect both Houses, and put an end to the pending bills(*a*). In the next Parliament after the dispute just mentioned, it was proposed to enact that "Bills that pass not this session should remain in the state they should be left in till the next session." But this was opposed by Coke and others as a dangerous innovation(*b*).

The constitutional effects of prorogation and adjournment were greatly debated in Parliament in 1677. At that time Parliament met after having been prorogued almost fifteen months. Lord Shaftesbury and others contended that Parliament was dissolved by a prorogation exceeding one year, and for thus calling in question the authority of that Parliament, were committed by the Lords to the Tower(*c*).

The periods for which Parliament has been continued and prorogued have varied greatly. The more ancient Parliaments lasted each a single session only(*d*). Until 5 Richard

or repeated, or ended in a prorogation or dissolution. He cites several instances in which adjournments were so used in the reign of Charles II. ('English Constitution,' ch. 3.)

(*a*) When adjournments have taken place at the King's desire, usually both Houses have adjourned simultaneously. When, in 1711, Queen Anne sent a message to the House of Lords for an adjournment, a great debate was raised, and it was said that if one House were ordered to adjourn while the other continued to sit, "this might end in a total disjointing of the Constitution." (Burnet, Hist. of his own Time, A.D. 1710.)

(*b*) 2 Hatsell, 336 *n*.

(*c*) A full account of these proceedings is given 2 Hatsell, App. 5. For this long prorogation the King (Charles II.) received large sums of money from Louis XIV., who was anxious to prevent him from forming alliances in accordance with the wishes of Parliament. (Burnet, Hist. of his own Time, A.D. 1677.)

The prorogation of Parliament for more than a year seems to have been not without precedent. A Parliament of Henry VIII. reassembled in 1536 after a prorogation said to have continued fourteen months. (Parry's 'Parliaments,' 203.)

(*d*) In a previous chapter (p. 10) we have noticed the ancient use of the

II., A.D. 1381, there is no clear instance of two sessions of one Parliament. The first instance of a Parliament continuing more than a year is 23 & 24 Henry VI., A.D. 1445-6, when a prorogation of several months took place on account of the plague(*a*). For a long time afterwards prorogations were occasioned principally by external circumstances, as seasons, festivals of the Church, war, or visitations of the plague. A Parliament of 12 Edward IV., A.D. 1472, which sat, with several prorogations, two years and a quarter, was the longest that occurred up to that time. There is not so long a Parliament again until 21 Henry VIII., A.D. 1529, when a Parliament sat which continued five years and five months. In the second year of this period the House of Commons complain to the king of their fatigue, and pray to be dissolved; he roughly replies that if they depart prematurely they will have no remedy for the sundry grievances which they previously declared to him. The practice of Parliament sitting for long periods may be considered to have commenced in the reign of Henry VIII.(*b*). In the next reign there is a Parliament of upwards of four years. But the practice of regularly proroguing the same Parliament from year to year, for several years, appears to have been introduced by Elizabeth(*c*).

On some occasions it has been found convenient to prorogue Parliament for a few days only. Thus, in 1689, the King prorogued Parliament from the 21st to the 23rd of October. The Bill of Rights had dropped, from a disagree-

word Parliament to denote judicial as well as legislative assemblies, and that the former were summoned much more frequently than the latter. Legislative Parliaments were annually renewed, with comparatively few exceptions, from 23 Edw. I. to the time of Henry VIII. (See Parry, lv.)

(*a*) The Parliament 7 & 8 Hen. IV. (A.D. 1406), which continued by prorogations nearly a year, was the longest on record up to that time. This continuance of that Parliament was greatly complained of by ancient historians as an innovation, and on account of the loss to the commonalty for the expenses of their representatives. (Parry's 'Parliaments,' 166, note.)

(*b*) 8 State Trials, 8.

(*c*) Parry's 'Parliaments,' table, p. lv., and the body of the work under the respective dates.

ment between the two Houses, and (it being against Parliamentary usage in such case to bring in the same bill again in the same session), in order to the reintroduction of the Bill, the session was terminated by a prorogation(*a*). In 1707, a similar course was adopted with respect to a bill relating to imports into Scotland. A session of 1721 was determined by a short prorogation, to enable the House of Commons to pass subsequently some resolutions respecting the South Sea Company, which were contradictory of an Act of that session; it being a general rule that no question ought to be offered for decisions of either House twice in one session(*b*).

Prorogation at the end of a session is usually either by command and in the presence of the Sovereign, signified by the Lord Chancellor or Speaker of the House of Lords to both Houses together, or, in the absence of the Sovereign, by Royal Commissioners appointed for the purpose(*c*). The regular practice now is that Parliament, in the course of the recess, is prorogued from time to time by commission, of which prorogations notice is given by proclamation or order in Council published in the 'Gazette;' and when it is intended that Parliament shall actually sit for "dispatch of business," notice of this is specified in the proclamation(*d*).

Prorogation by writ takes place only with respect to a new Parliament. In the proclamation for calling a new Parliament, a time is stated for its meeting, and if it be intended that it shall then sit for dispatch of business, no other proclamation is necessary; but when such Parliament is prorogued before it meets, the prorogation is usually by writ under the Great Seal, directed to the Lords and Commons, and the intention to issue such writ is announced by proclamation(*e*).

A *dissolution* is the civil death of Parliament, and may be effected either by efflux of time or the demise of the Crown, as we have already seen, or by the will of the Sove-

(*a*) 2 Hatsell, 328. (*b*) *Ibid.* 127, 129. (*c*) *Ibid.* 326.
(*d*) *Ibid.* 332. (*e*) *Ibid.* 303 *n*, 323 *n*.

reign, expressed either in person or by representation. For as the King has the sole right of convening Parliament, so also it is a branch of the Royal prerogative that he may, whenever he please, prorogue the Parliament for a time, or put a final end to its existence. "If," says Montesquieu(*a*), "the legislature had the right to prorogue itself, it might be that it would never prorogue itself,—a dangerous circumstance in the case of its engaging in any attempt against the executive power. . . . If the executive power had not the right to control the attempts of the legislative power, the latter would become despotic; for, as it could give to itself all the power, it would destroy all other powers." And Blackstone says(*b*), "If nothing had a right to prorogue or dissolve Parliament but itself, it might happen to become perpetual. And this would be extremely dangerous, if at any time it should attempt to encroach on the executive power; as was fatally experienced by the unfortunate King Charles I., who, having unadvisedly passed an Act(*c*) to continue the Parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power which he himself had consented to give them."

The more ancient mode of dissolving Parliaments was by the King's command signified to both Houses in his presence; but the later practice, since the Revolution of 1668, has been, that the Parliament is prorogued, and then a proclamation issues for its dissolution(*d*). The proclamation

(*a*) Esprit des Lois, liv. ii. c. 6. (*b*) 1 Comm., ch. 2.

(*c*) Clarendon calls this a measure of "fatal consequence," and a measure "to remove the landmarks and destroy the foundation of the kingdom." —Hist. of Rebellion, book 3. Hatsell, who seems to have studied carefully the Parliamentary history of the time of Charles I., adds,—"Yet if this Act had not been obtained, perhaps it would have been impossible to oppose the King's attempts with effect." (Precedents, 221 *n.*) The last remark, however, confirms the conclusion (which is quite independent of other questions then pending between Charles and his Parliament), that in order to prevent the executive power from being destroyed by the legislature, the former must have the power of dissolving the latter.

(*d*) 2 Hatsell's 'Precedents,' 382. In 1818, Parliament was dissolved by the Prince Regent in person. (May's Parliamentary Prac., 49.)

usually states that orders have been given to the Lord Chancellor forthwith to issue writs for calling together a new Parliament(*a*).

The constitutional effect of dissolutions of Parliament will be most clearly seen by reference to some of the occasions on which Parliaments have been dissolved by the exercise of the Royal prerogative. The causes of such dissolutions which principally require notice are opposition of the Commons to the King—or to the King's ministers—or to the House of Lords.

Of dissolutions arising from opposition of the House of Commons to the King himself, it will be sufficient, without going further back in history, to cite one or two instances occurring under the Stuart dynasty. In 1621, James I., wearied by his disputes with the House of Commons about their privileges and unwillingness to grant supplies, suddenly dissolved Parliament, sent several members to prison, and, as we have seen, erased from the journals of the House of Commons an obnoxious protestation. In a declaration to the next Parliament, he says, that though he has "broken the necks of three Parliaments one after another," he hopes that this will be a "happy Parliament"(*b*). In 1625, Charles I. dissolved Parliament because the Commons proceeded with the consideration of grievances and postponed supplies. In 1626, he dissolved Parliament to avert the impeachment of the Duke of Buckingham. On this occasion the Lords, interceding for a longer sitting, are answered, "No; not for a minute." The Parliament is dissolved; the King publishes a declaration of reasons for the dissolution; the Commons reply, and by Royal proclamation the reply is ordered to be burnt.

In 1678, and again in 1679, Charles II. dissolved Parliament to stop the impeachment of Lord Danby and others; but on the latter occasion Charles stated the dissolution to be on account of disputes between the two Houses, which

(*a*) Clerk, 'Law of Elections,' 1.
(*b*) Parry's 'Parliaments,' 291, 296.

are noticed hereafter(*a*). His fourth Parliament was dissolved A.D. 1681, on a dispute of the Commons with him respecting the Exclusion Bill(*b*). James II. dissolved his Parliament in 1687 (after long prorogations), on account of his disputes with the Commons respecting his suspension of the penal laws against Roman Catholics(*c*).

After the accession of William III. the Ministers of the Crown became dependent in a greater degree than theretofore upon Parliamentary support. In William's reign we find the ministers on one occasion seeking for an accession of political strength in a new Parliament, and on the failure of that expectation, giving place to the opposite party. In 1700, the ministers, who were of the Whig party, apprehensive of a powerful opposition in Parliament, prevailed on the King to dissolve it. In the elections their interest sank, and shortly afterwards their opponents were called into the King's service(*d*).

The next dissolution of Parliament in that reign is remarkable, as an instance contrary to the rule now well established, that the Royal prerogative of dissolving Parliament is to be exercised in conformity with the advice of the Ministers of the Crown. In 1701, William III. resolved to dissolve the Parliament last mentioned, and "the new ministry struggled hard against a dissolution, and when they saw the King resolved on it, some of them left his service." The King seems to have been induced to dissolve this Parliament by dissensions between the two Houses, by the unpopularity of the House of Commons, and by addresses which "the City of London began, and all the nation followed" in favour of a dissolution(*e*).

(*a*) Parry's 'Parliaments,' 587, 590; 2 State Trials, 1446. As has been mentioned, *ante*, p. 52, it is now settled that dissolution does not put an end to proceedings of impeachment.

(*b*) Burnet, A.D. 1681.

(*c*) Burnet, Hist. of his own Time, A.D. 1687. (*d*) *Ibid.*, A.D. 1700.

(*e*) *Ibid.*, A.D. 1701. The resolution of the next House of Commons, with respect to these addresses, has been adverted to in the earlier part of this chapter.

In 1710 Queen Anne resolved upon a dissolution of Parliament and change of ministry in accordance with her own predilections. She had already received various addresses from the Tory party, assuring her that in a new election members of their and her politics should be chosen. Shortly after the appointment of Mr. Harley as Prime Minister she dissolved Parliament, with a view to the increase of the power of her ministers in Parliament(*a*).

The Parliaments of the reigns of George I. and George II. were continued for nearly the whole periods of their legal existence; and it is not until the reign of George III. that we find an instance of a dissolution on account of the majority of the House of Commons being opposed to the Ministers of the Crown.

In 1784 the King resolved to dismiss his ministers, who were personally obnoxious to him, although they were supported by a majority of the House of Commons, and he called Mr. Pitt to his counsels. The House of Commons passed resolutions adverse to his ministry, and addressed the Crown for his removal. Instead of resigning, Mr. Pitt advised the King to dissolve Parliament, and in the new Parliament procured a large majority in his favour.

"The precedent of 1784," says Lord John Russell(*b*), "therefore establishes this rule of conduct—that if the ministers chosen by the Crown do not possess the confidence of the House of Commons, they may advise an appeal to the people, with whom rests the ultimate decision. This course has been followed in 1807, in 1831, in 1834, and in 1841(*c*).

(*a*) Burnet, A.D. 1710.

(*b*) Memorials and Correspondence of Charles James Fox, vol. ii. p. 245.

(*c*) Of the four precedents here adverted to, that of 1807 was advised by Mr. Perceval, whose administration was formed on the refusal of his predecessors to pledge themselves against concessions to the Roman Catholics. The dissolution of 1831 took place when the ministers were defeated in the House of Commons on the question of Parliamentary Reform. In 1834, William IV., disliking the policy of Lord Melbourne's ministry with respect to the Irish Church, although that ministry had the support of a large majority of the House of Commons, entrusted to Sir Robert Peel the forma-

In 1807 and 1831, the Crown was enabled, as in 1784, to obtain the confidence of the new House of Commons. In 1834 and 1841, the decision was adverse to the existing ministry." To this it may be added, that when the ministers have not the confidence of an old Parliament, as in 1784, they have before them the alternative of a dissolution; but where they have already appealed to the country for support, as in 1841, and again in 1859, a vote showing that they have not the confidence of the House of Commons has been conclusive(*a*).

Another ground of dissolving Parliament has been the existence of disputes between the Lords and Commons; and of this one or two instances may be briefly cited. Charles II. in 1679 prorogued his third Parliament, "because to his grief he saw there were such differences between the two Houses that he is very afraid very ill effects will come of it;" and during the period of prorogation the Parliament was dissolved(*b*). The dispute referred to was occasioned by the refusal of the House of Lords to proceed with the impeachment of the Lord Treasurer Danby, on the ground of irregularity in the impeachment; but another motive of the dissolution was, the opposition of the House of Commons to the will of the King(*c*). On another occasion of a dispute between the two Houses, Parliament was dissolved in 1701 by William III. Some of the circumstances of this dissolution have just been adverted to. The dissension between the two Houses, which was carried on with great acrimony, related to the impeachments of Lord Somers and others of the King's ministers(*d*). An-

tion of a new ministry. He advised a dissolution of Parliament, but finding the new Parliament of 1835 adverse to him, resigned.

(*a*) May's Constitutional Hist., vol. i. p. 402.

(*b*) Parry's 'Parliaments,' 590. A long prorogation of the same Parliament took place a few years previously in this reign, on the occasion of a serious dispute (A.D. 1675) between the two Houses respecting the appellate jurisdiction of the Lords in causes in which members of the House of Commons are parties. (Parry's 'Parliaments,' 571 *et seq.*; Burnet, Hist. of his own Time, A.D. 1675.)

(*c*) 8 Hume's Hist. 88.

(*d*) Burnet, A.D. 1701.

other dissolution of Parliament in 1705 was occasioned by a dispute between the Houses with respect to the important case known as that of the "Aylesbury Men." On appeal from the Queen's Bench, the House of Lords decided that an elector might bring actions at law against returning officers for refusing his vote at a Parliamentary election. Certain electors of Aylesbury who brought such actions were committed to prison by the House of Commons for contempt of their jurisdiction. The House of Lords, in an address to Queen Anne, condemned the proceedings of the Commons; and she, to put an end to the disputes, prorogued and dissolved Parliament(*a*).

(*a*) See further as to this case, *infra*.

CHAPTER VII.

THE CONSTITUTION OF THE HOUSE OF LORDS.

THE Lords Spiritual and Temporal form one legislative assembly. They intermix in voting; so that, though anciently regarded as two estates, they are but one for legislative purposes, and an Act of Parliament is valid if passed without the assent of any of the Lords Spiritual(*a*).

During the earlier reigns after the Conquest, the Spiritual and Temporal Lords were the only members of the legislative and judicial assemblies of the realm; and though on extraordinary occasions the opinions of an inferior class of the community were occasionally asked, the Commons had no real participation in the business of these councils before the forty-ninth year of Henry III., when the change in this respect, to which we have already adverted, took place(*b*).

1. *The Lords Spiritual.* In the earlier Parliaments the number of the Lords Spiritual was generally greater than that of the Lords Temporal. In the year 49 Hen. III. already noticed, 120 Prelates and only twenty-three Temporal Lords were summoned. In subsequent reigns the numbers varied considerably; but the Temporal Lords rarely exceeded the Spiritual Lords in number(*c*). At the time of the dissolution of monasteries by Henry VIII., the Spiritual

(*a*) 1 Blackstone, Comm., 156. The Act of Uniformity, 1 Eliz. c. 2, passed with the dissent of all the bishops. In the first two Parliaments of Charles II. no bishops were summoned. (*Ibid.*)

(*b*) Parry's 'Parliaments,' xvi.

(*c*) *Ibid.* xvii.

Lords—archbishops, bishops, mitred abbots, and priors—were equal in number to the temporal nobility(*a*).

All archbishops, bishops, abbots, and priors, holding by barony, were usually summoned to Parliament. They were summoned constantly, and as of right, not as bishops, abbots, and priors, but in respect of their baronies. Abbots and others, not holding by barony, were also summoned at the King's pleasure by bare writ of summons; but such summons did not ennoble them, but made them only assistants and joint councillors with the Lords in Parliament(*b*). At the Conquest, the possessions of the bishops were converted into baronies, and for a long time after they were summoned to Parliament as barons by tenure(*c*). But for many centuries past they have been called to sit without any regard to their temporal possessions, or the tenure by which they are held. The bishops of the new sees erected by Henry VIII. never had any estate by baronial tenure, and consequently had no claim to be called to Parliament otherwise than as prelates of the Church, and by reason of the usage which had long prevailed as to their order(*d*).

One of the last Acts of the reign of Charles I. was an Act by which bishops were disenabled from sitting in Parliament. This Act was repealed the year after Charles II. came to the throne(*e*). Since then bishops and archbishops have uninterruptedly sat in Parliament.

Besides the two archbishoprics of Canterbury and York, there are twenty-six English bishoprics. The two archbishops have always seats in Parliament, as have the bishops

(*a*) 1 Blackstone, Comm., 155. (*b*) Parry's 'Parliaments,' xviii.

(*c*) William the Conqueror changed the spiritual tenure of frankalmoign or *free alms*, under which the bishops held their lands under Saxon government, into the feudal tenure *by barony*, which subjected their estates to all civil charges and assessments from which they were before exempt. (1 Blackstone, Comm., 156.)

(*d*) Butler's Co. Litt., 134 *a*, note. After the dissolution of the monasteries, Henry VIII., by letters-patent, erected five new Sees—Chester, Gloucester, Peterborough, Bristol, and Oxford. These letters-patent are recited in the statute 34 & 35 Hen. VIII, c. 17. The bishops of these Sees have always been included among those entitled to sit in Parliament.

(*e*) 13 Charles II. st. 2, c. 2.

of London, Durham, and Winchester. The Bishop of Sodor and Man has no seat. Of the rest of the bishops, all have seats except the bishop last elected; consequently, the number of bishops having seats is twenty-four(*a*).

Four bishops of the Church of Ireland, of whom an archbishop is always one, sit by rotation in the House of Lords(*b*). Bishops of the Irish Church were added to the House of Lords at the Union of Great Britain and Ireland.

2. *The Lords Temporal.* It has been already noticed that at the time of the Conquest, the tenures by which the bishops held their lands were changed to feudal tenures. A corresponding change was made as to other proprietors of land. The Norman Conquest was a subversion of the titles to land, which was distributed by the Conqueror among his followers and the Saxon proprietors, subject to feudal tenure. According to the obligations of that tenure, as the immediate free tenants of every superior lord were bound to attend his Court, the King's immediate tenants were bound to attend his Court. He had a right to require the attendance of his barons, both temporal and spiritual; and the latter, as has been already observed, were deemed to hold

(*a*) This arrangement was made on the creation of the See of Manchester. It was provided that the number of Lords Spiritual should not be increased by that creation. The statutory rule is as follows:—"Whenever there shall be a vacancy among the Lords Spiritual by the avoidance of any one of the Sees of Canterbury, York, London, Durham, or Winchester, or of any other See which shall be filled by the translation thereto from any other See of a bishop at that time actually sitting as a lord of Parliament, such vacancy shall be supplied by the issue of a writ of summons to the bishop who shall be elected to the same See; but if such vacancy be caused by avoidance of any other See in England or Wales, such vacancy shall be supplied by the issue of a writ of summons to that bishop of a See in England or Wales who shall not have previously become entitled to such writ; and no bishop who shall be hereafter elected to any See in England or Wales, not being one of the five Sees above-named, shall be entitled to have a writ of summons, unless in the order and according to the conditions above prescribed." (10 & 11 Vict. c. 108.)

(*b*) The Act for the union of Great Britain and Ireland, 39 & 40 Geo. III. c. 67, s. 2, established a certain rotation among the Irish bishops entitled to sit in the House of Lords. This rotation was modified by sections 51 & 52 of 3 & 4 Will. IV. c. 37, by which Act the number of Irish sees was reduced.

sicut baroniam, and were required like other barons to do homage for their possessions(*a*).

From the Conquest to the close of John's reign, the council of the King was a council of barons. As has been stated in a former chapter, the attendance at the King's council was far less numerous than the principle of feudal tenure just mentioned would indicate. The Charter of John distinguishes *majores barones* from the other tenants-in-chief. The *majores barones* may have been those whose persons and property made them well known to the King's officers, and who were therefore summoned by special writs, while the more numerous body of tenants-in-chief were summoned only generally(*b*).

After the introduction of the system of summoning representatives to Parliament, tenure began to be disregarded as the foundation of the right of barons to be summoned to the King's councils. It does not appear, however, that before the reign of Richard II. any barons were among the peers, except such as received writs of summons to Parliament as barons by tenure(*c*). Richard II. was the first to confer the peerage by *letters-patent*, irrespectively of tenure(*d*).

It will be thus seen that the peerage was originally territorial; when the land was alienated, the dignity passed with it. But when alienations grew to be frequent, the dignity of the peerage, instead of thus passing, was confined to the lineage of the person ennobled(*e*). In the same

(*a*) Parry's 'Parliaments,' Introduction. (*b*) *Ibid.*

(*c*) 1 Blackstone, Comm., 399, referring to Co. Litt., 9 *b*, where it is said that the earliest known instance of the creation of a baron by letters-patent is 11 Rich. II. (A.D. 1388). "All lords and barons before and in 24 Edw. III (A.D. 1350) were barons by tenure, and not by writ alone, as all were regularly summoned in 'Fide et Homagio,' and not in 'Fide et Ligeantiâ,'—an alteration which was adopted in 25 Edw. III."—Parry's 'Parliaments,' xviii., where it is added, on the authority of Prynne, that in several of the following reigns most of the lords were lords by tenure as well as by patent writ, or creation.

(*d*) 1 Blackstone's Comm., 399; Co. Litt., 9 *b*.

(*e*) Blackstone, Comm., 400. It has been said that there is not any

reign in which peerage was first conferred by letters-patent an ordinance was made, "that all and singular persons and commonalties who shall thenceforth have summons to Parliament, shall come as they were bound to do, and had been accustomed in ancient times"(*a*). This statute confirmed the rights of the temporal and spiritual peers as well as of the counties, cities, and boroughs, to summonses to Parliament, usage being taken as the evidence of the respective rights. A permanent title was thus recognized in those peers whose ancestors had been summoned to Parliament, and the temporal peers are deemed to have then established their hereditary titles, qualified wherever the title had been qualified by its original and known creation(*b*).

There are, says Coke, two ordinary ways of creation of nobility—by writ and by letters-patent(*c*). The latter is the most usual way now, though, as we have seen, the former is the more ancient. But the writ of summons to Parliament does not ennoble unless the person summoned to Parliament actually takes his seat there(*d*). The method of

barony by tenure remaining except Arundel. (Butler's Co. Litt., 31 *b*, note 6.) But it is now settled that the right to sit in the House of Lords by reason of tenure of particular lands has long been discontinued and does not now exist. (Berkeley Peerage Case, 8 Jurist, N. S. 20.) There is no known precedent of the transfer of a barony by tenure to a stranger without the sanction of the Crown. (Per L. C. Campbell, *ibid.*) The right to a writ of summons by tenure had been abandoned as early as 23 Edw. I. (Per Lord Cranworth, *ibid.*)

(*a*) 5 Rich. II., A.D. 1382.

(*b*) See 1 Report on the Dignity of a Peer, 342.

(*c*) Co. Litt. 16 *b*. He adds, "For I will not speak of creation by Parliament." It is said that creation in Parliament was by the King sitting in person, by parol and investiture, with the consent and authority of Parliament. (Tract on Life Peerages, by J. C. M. Meekings. Lond. 1856.) There are records of several creations of peers by Richard II. and Henry V. in Parliament. See 5 Clarke's House of Lords' Cases, 970. In 21 Rich. II. peerages were conferred in full Parliament on one day on several peers and a peeress. (Parry's 'Parliaments,' 158 *n*.)

(*d*) Coke adds, that summons by writ is sufficient to create an hereditary barony; but Prynne declares this opinion not to be law, for several reasons,—among others, because the summons by writ is only to a particular Parliament, and not to all future Parliaments. (Prynne, Plea for the Lords, 147.) But it is now settled that a writ and sitting under it are sufficient to

creation by letters-patent is therefore the most secure way of conferring nobility on a man and his heirs, because the title is not lost by his omission to sit in Parliament. But where, as is sometimes done, the eldest son of a peer is called to the House of Lords in his father's lifetime, it is usual to call the son by a writ of summons, because there is no danger of his children losing the nobility in case he never takes his seat, for they will succeed to their grandfather (*a*).

The letters-patent usually limit the inheritance to the heirs *general* of the person ennobled; but the King may by the patent restrict the inheritance as to the heirs male, or the heirs of the body of the person ennobled (*b*).

If a peer, having the dignity to him and his heirs, die, leaving a sole heiress, the dignity descends to her as well as any other inheritance. But if he die leaving coheiresses, the King may, for the uncertainty, confer the dignity on which of them he please; and till he thus revives the title it is said to be *in abeyance*. There are several instances of a barony revived after an abeyance of several centuries (*c*).

Coke expressly states that the King may create either a man or a woman noble for life, and Blackstone follows him in that proposition (*d*). This proposition has been disputed in an important debate in the House of Lords respecting peerages for life. In February, 1856, that House referred

create a barony. (Hubback on the Evidence of Succession, 152.) The reason why the creation by letters-patent is complete without sitting, is that letters-patent cannot, like a writ of summons, be countermanded by the King. (*Ibid.*)

These letters-patent are passed under the Great Seal in pursuance of the King's warrant to the Lord Chancellor. (2 Hatsell's Precedents, 396.)

(*a*) 1 Blackstone's Comm., 400.

Lord Clifford, son and heir of the Earl of Burlington, was called by writ, and died in his father's lifetime. The House of Lords decided, A.D. 1694, that Lord Clifford's son and heir was entitled to a writ of summons by the title of his father. (5 Clark's House of Lords' Cases, 975.)

(*b*) Co. Litt. 16 *b*. According to Mr. Hargrave's opinion, a barony may be granted to a man and his wife as joint tenants in special tail. (7 State Trials, 1571, note.)

(*c*) Butler's Co. Litt., 165 *a*, note.

(*d*) Co. Litt., 9 *b*, 16 *b*; 1 Blackstone, Comm., 401.

to a committee the examination of the letters-patent conferring such a peerage on Sir James Parke as Baron Wensleydale. The House of Lords decided that neither the letters-patent, nor the same with the usual writ of summons issued in pursuance thereof, entitled the grantee to sit in Parliament(*a*). It was argued that the dicta of Coke and others, by which the prerogative claimed for the Sovereign to create peers for life is supported, were not warranted by precedents; that in the cases in remote times in which such peerages appear to have been granted, they were granted by the authority of Parliament, which of course could legalize them; that even if such a prerogative of the Sovereign ever existed, it had become obsolete, as it was certain that no life-peerages had been created for several centuries. It was also contended that a power in the Crown to grant such peerages might be attended with dangerous consequences to the independence of the House of Lords, as the advisers of the Crown might on some occasions, in order to increase their political power, advise an exercise of that power, as they would not be restrained by the fear of permanently increasing the number of peers(*b*). In consequence of the decision of the House of Lords, Lord Wensleydale was subsequently created an hereditary peer.

The peers of Scotland who sit in Parliament are sixteen peers, who are elected by and represent the body of the Scotch nobility, and are chosen for one Parliament only(*c*). The peers of Ireland who sit in Parliament are twenty-eight, elected for life by the peers of Ireland. The power of the Crown to add to the number of Irish peers is limited by the fourth article of the Union with that country. A

(*a*) Wensleydale Peerage Evidence, p. 106; 5 Clark's House of Lords' Cases, 958.

(*b*) Hansard's Debates, Feb. 1856.

(*c*) 5 Anne, c. 8, art. 22; 6 Anne, c. 23; 10 & 11 Vict. c. 52. By the latter statute, claims to vote in respect of dormant or extinct peerages of Scotland are not to be allowed at elections of representative peers of Scotland. A Scottish peer, after being made a peer of Great Britain, cannot vote at the election of Scottish representative peers. So decided in the Duke of Queensberry's Case. (Burnet, Hist. of his own Time, A.D. 1709.)

new Irish peer can be created only on certain vacancies in the Irish peerage mentioned in the article, the intent and meaning of which is declared to be to keep up the Irish peerage to the number of one hundred(*a*).

It has been already stated that fresh writs of summons are issued to the peers, as well as for the election of the House of Commons at every new Parliament. The Lords Spiritual and Temporal are entitled to their several writs of summons *ex debito justitiæ*(*b*). Elsynge says he could find no instance in which any baron hath been omitted if he were of full age, stood *rectus in curiâ*, and were within the land, unless he had so diminished his revenues as that he could not maintain the state of his honour, whereof there are some few unpleasing precedents(*c*). There are many instances of petitions to the House of Lords by peers for their writs of summons(*d*). In the first year of Charles I., while the Commons were proceeding to impeach the Duke of Buckingham, one of his opponents, the Earl of Bristol, was under the King's displeasure, and, by the influence of Buckingham, his summons to Parliament was withheld. Lord Bristol petitioned the House of Lords for his writ of summons, and the House addressed the Crown to send writs of summons to him and other lords from whom they had been withheld. Bristol's summons was thereupon sent; but with it a letter from the Lord Keeper, signifying the King's pleasure that he should not attend Parliament. Bristol answered the letter reasonably objecting that the writ of summons "commandeth me, upon my faith and allegiance, I fail not to come and attend his Majesty, and this under the Great Seal of England. In the other, as in a letter-missive, his Majesty's

(*a*) 39 & 40 Geo. III. c. 67, art. 4.

(*b*) 4 Coke, Inst. 1; Prynne, Plea for the Lords, 35.

(*c*) Elsynge's Method of Holding Parliaments, 45.

(*d*) May 18, 1621. The Earl of Northumberland petitions the House of Lords for his writ of summons: it is ordered to be made and sent. The Earl of Hertford also petitions: ordered to learn his Majesty's pleasure. (Parry's 'Parliaments,' 283.)

pleasure is intimated by your lordship that my personal attendance should be forborne," and he expresses a doubt which command he ought to obey (*a*). The doubt was not resolved, for pending the proceedings against the Duke of Buckingham, Parliament was, as we have already mentioned, abruptly dissolved.

A peer cannot divest himself of his own honour, nor can it be taken from him, except by Act of Parliament, attainder of his person, or (it has been said) *scire facias* to repeal his patent if the creation be by letters-patent. The King cannot countermand them, though where the creation is by writ the King may supersede the writ before the Parliament. But letters-patent being a conveyance at common law, the patentee is entitled to the grant by matter of record, which cannot be vacated except by *scire facias* at the suit of the King, to which the patentee may have his answer (*b*).

Where, upon the death of a peer, doubts arise as to the devolution of the dignity, and in all cases of long abeyance or other non-enjoyment of a peerage, the Lord Chancellor will not issue his writ of summons to a claimant without previous investigation. In the cases of Scotch and Irish peerages, this investigation is frequently necessary before a claimant's right to vote at elections of peers of those parts of the United Kingdom will be admitted.

To procure an investigation of a claim of peerage, the claimant petitions the Crown. In ancient times the claims were usually investigated in the Courts of the High Constable and Earl Marshal; now the Crown always refers the petition in the first instance to the Attorney-General, who,

(*a*) 2 State Trials, 1267; Elsynge, 49.

(*b*) 1 Blackstone's Comm., 402. Opinion of Chief Justice Holt, 12 State Trials, 1190.

A *scire facias* is a judicial writ founded on judgments at law, letters-patent, and other matters of record, to enforce or vacate them. A *scire facias* to repeal letters-patent may be had by the King where his grant was founded on fraud or false suggestion; or if the letters-patent grant anything to the prejudice of a prior grantee, he may have a *scire facias* to repeal them. (2 Saunders's Reports by Williams, 71, 72 *n.*)

having received evidence of the claim, reports either in favour of or against the claim, or, as is most usual, recommends its reference to the House of Lords. The reference to the House of Lords is the usual course, but in some instances the peerage has been allowed without reference to the House(*a*).

It has been said, on very high authority, that the reference to the House of Lords is entirely discretionary in the Crown, and that without such a reference the House of Lords has no jurisdiction(*b*).

In the case of the Wensleydale peerage, however, which has been already referred to, the House of Lords referred the patent to a Committee of Privileges without a reference from the Crown. To the objection that without such reference the House could not question the validity of the peerage, it was answered that the House had a right of its own authority to inquire into a new patent, though it might not have power to examine into the claim of an old peerage, except upon reference from the Crown(*c*). It is to be observed also that the question which the House referred to its Committee of Privileges was not whether the Crown had power to confer the dignity of a Baron for life, but whether such dignity gave the right to sit and vote in that House.

(*a*) Hubback on Succession, pt. i. ch. 5.

(*b*) Lord Holt, C.J., in the Banbury case, 12 State Trials, 1196. Charles Knowles claimed to be Earl of Banbury, and in January, 1692, the House of Lords dismissed his claim. Subsequently he was indicted and arraigned in the King's Bench. He pleaded peerage as a bar to the jurisdiction of the court, and the court allowed his plea.

In another case (Prideaux *v.* Morrice, 7 Modern Reports, 13,) the court is reported to have said that the Banbury case, in which the Court of King's Bench determined a right of peerage, was a precedent not to be followed.

A subsequent claim to the earldom of Banbury, in 1727, was disallowed without a reference to the House of Lords. (Hubback, *ubi supra.*)

(*c*) 5 Clark's House of Lords' Cases, 964, 967.

If any question be moved in Parliament for privilege or precedency of any lord of Parliament, it is to be decided by the lords of Parliament in the House of Lords, as all privileges and other matters concerning the Lords' House are. (4 Coke, Inst., cap. 77.)

The reference of a peerage claim by the Crown is brought down to the House by a member, and an order is made that the petition and reference be referred to the Lords' Committee of Privileges. Before that committee a very stringent investigation takes place, in which strict rules of evidence are adopted. The committee then comes to a resolution, which is reported to the House, and, if agreed to, is notified to the Crown in pursuance of the order of reference. The Crown usually acts in conformity with such resolutions; but there are some instances in which the Crown has granted a second reference, on which the Lords have come to a resolution directly contrary to their former one(*a*).

Up to the time of Edward III., the temporal peers were all earls or barons. The first duke after the Conquest was Edward the Black Prince, created by Edward III.; the first marquis was created by Richard II.; and lastly, the dignity of viscount was created by Henry VI.(*b*).

The number of temporal peers summoned to Parliament has, since its regular constitution, varied greatly from various causes, including the extinction of peerages by failure of issue or attainder, and the creation of new peers. It has been observed already, that before the dissolution of the monasteries the number of spiritual peers commonly exceeded that of the temporal peers. From the institution of the representative system, 49 Hen. III., to the end of the Tudor dynasty in the reign of Elizabeth, the number of temporal peers summoned was, in the majority of instances, about fifty or sixty, though in some few Parliaments the number of temporal peers exceeded one hundred(*c*). In the reign of Elizabeth the number was between sixty and seventy(*d*). By the Stuarts the number of hereditary peers was largely increased, and in time of Charles II. had become one hundred and forty-two, and in the time of James II. had

(*a*) Hubback on Succession, pt. i. ch. 2.
(*b*) 2 Coke, Inst., 5; Parry's 'Parliaments,' xvi.
(*c*) Parry's 'Parliaments,' lii.–liv., 194 *et seq.* (*d*) *Ibid.*, 226 *et seq.*

become one hundred and fifty(*a*). Including sixteen representative Scottish peers added at the union with Scotland, the number of temporal peers had increased by twenty more at the accession of George III. Since that time, besides the addition of twenty-eight temporal Irish peers at the union with Ireland, a great increase of the hereditary peers of Parliament has taken place. Their number now is much more than double what it was at the accession of George III.; and as many titles have been absorbed or merged in the interval, it follows that the large majority of existing peerages have been created since the accession of George III.

Our history presents several instances of the exercise of the Royal prerogative by the creation of many peers at once. This power is a constitutional check on the House of Lords; but a wholesale creation of peers for the purpose of obtaining a majority in that assembly, is extremely rare. In Queen Anne's reign an experiment was made, says Burnet, which none of our princes ventured on in former times: a resolution was taken up very suddenly of making twelve new peers all at once; three of these were called up by writ, being the eldest sons of peers, and nine were created by patent. This was looked on as an undoubted part of the prerogative, so that there was no ground in law to oppose the receiving the new lords into the House. Nor was it possible, Burnet adds, to raise in the ancient peers a sense of the indignity put on their House, since the Court did by this openly declare that they were to be kept in absolute submission and obedience(*b*).

In 1776, before the arrears of the Civil List were brought before Parliament, George III., by the advice of Lord North, created ten new peers(*c*). Shortly before the second read-

(*a*) Parry's 'Parliaments,' 540, 595.

(*b*) Burnet, 'History of his own Time,' A.D. 1711-2. In a previous year of that reign, A.D. 1702, the dominant party, "as they intended to have a clear majority in both Houses in the next session, prevailed with the Queen, soon after the prorogation, to create four new peers, who had been the most violent of the whole party." (Burnet, A.D. 1702.)

(*c*) May's 'Constitutional History,' p. 231.

ing in the House of Lords of the Bill of 1831 for reform in Parliament, sixteen new peers were created(*a*). Previously to the passing of the Reform Act of 1832, William IV. consented to create a sufficient number of peers to secure its passing. Anxious, however, to avoid that course, the King persuaded the peers opposed to the Reform Bill to withdraw their opposition, and accordingly the bill was passed(*b*).

In contemplation of the creation of twelve peers by Queen Anne above-mentioned, a bill in the reign of George I. passed the House of Lords for limiting the number of peers. Blackstone seems to have thought that the effect of this bill was to restrain the Crown from gaining too great an ascendency in the House of Lords, "by pouring in at pleasure an unlimited number of new-created lords." But as De Lolme remarks, "no bill of greater constitutional importance was ever agitated in Parliament, since the consequences of its being pressed would have been the freeing the House of Lords, both in its judicial and legislative capacities, from all constitutional check whatever from either the Crown or nation"(*c*).

We have seen that the Commons have a control over the power of the Crown, by the privilege in extreme cases of refusing supplies; and the Crown has, by means of its power to dissolve Parliament, a constitutional control of the House of Commons. The only constitutional check of the House of Lords is the Royal prerogative of creating new peerages; except this, there are no other means of restraining or modifying the power of the House of Lords, when opposed to the declared and decided wishes of both the Crown and the people(*d*).

The constitutional effect of the division of the legislature

(*a*) May's 'Constitutional History,' p. 258.

(*b*) Roebuck's Hist. of the Whig Ministry, vol. ii. p. 334.

(*c*) 1 Blackstone's Comm., 157; De Lolme on the Constitution, book ii. ch. 19.

(*d*) Earl Grey, in House of Lords, May 17, 1832; 3 Mirror of Parliament, 2046.

into three branches, the Sovereign, the House of Lords, and the House of Commons, has been the subject of much controversy. The account of the constitution of the House of Lords would be imperfect without some brief notice of the diversity of opinions on this subject expressed by writers of eminence. The argument for the power of the House of Lords principally insisted upon is that which involves the well-known theory of a balance of power. This theory is thus regarded by De Lolme(*a*). He considers it essential to good government that the executive power and the legislative power should be each strictly confined within its own sphere; the executive is most easily so confined when it is single, the legislative by being divided, "since each of those parts into which it is divided can then serve as a bar to the motions of the others." Blackstone(*b*) writes much to the same effect; and he concludes that the government is so compounded, "that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest." Montesquieu(*c*), speaking of the government of England, remarks that "the legislative body being composed of two parts, the one controls the other by the mutual right of votes. Both are restrained by the executive power, which in its turn is restrained by the legislative. These three powers constitute equilibrium."

More modern writers have contended against this principle of a balance of powers. Mr. Bentham remarks(*d*), that the metaphorical expression "balance of power" is inexact. But that is an objection rather to the name of the principle than to the principle itself. The thing signified by the expression is perfectly clear. Taking the meaning of the expression to be, that each branch of the legislature may prevent the other two from doing anything, he objects that

(*a*) On the Constitution of England, book ii. ch. 3.
(*b*) 1 Blackstone's Comm., 51.
(*c*) De l'Esprit des Lois, livre ii. ch. 6.
(*d*) Book of Fallacies, part iv. ch. 3.

"whatever in the judgment of any one of them is contrary to its own sinister interest will not be done; and whatever is supposed by them to be conducive to the aggregate interest of them all will be carried into effect, though contrary to the universal interest of the people." These objections seem susceptible of a complete answer. To the first of them it may be answered that there exists (as has been already shown) a constitutional control over each branch of the legislature, which restrains an extravagant use of its power of veto; and some instances will be presently adduced in which that constitutional restraint has been found effectual. The second objection is founded on the erroneous assumption, that measures may be offered to the legislature which are supposed to be conducive to the interest of all its three branches, though contrary to the "universal interest of the people" (that is, the rest of the people). No measure is ever submitted to the legislature in which its members have not the like interest with some part of the rest of the people. If usually the part so interested were too small, the remedy would consist in amending the representation of the people.

Mr. James Mill(*a*) declares the theory of a balance of powers to be "wild, visionary, and chimerical;" and he asks, "if there are three powers, how is it possible to prevent two of them from combining to swallow up the third?" The answer is, that the combination of two powers to destroy the third, where there are three, is less probable than the overthrow of the weaker power by the stronger where there are only two. Our history presents many examples of the combination of two of the three powers of the state for defensive purposes, that is, to resist the encroachments of the third power, but no instance(*b*) of such combina-

(*a*) Encyclopædia Britannica, art. "Government."

(*b*) The overthrow of the kingly power in the person of Charles I. is no exception to this statement, for the House of Commons declared the abolition of the co-ordinate power of the House of Lords previously to the declaration of the abolition of the kingly power. January 3, 1649: the Commons order that "members of this House, and others appointed by

tion for the purpose of destroying the third power. Mr. Mill argues that "the monarchy and aristocracy have all possible motives for endeavouring to obtain unlimited power over the persons and property of the community. The consequences are inevitable: they have all possible motives for combining to obtain that power, and unless the people have power enough to be a match for both, they have no protection." The expression "all possible motives" probably means the single motive of self-interest; this is a motive which influences all three powers, and might possibly induce any two of them to combine against the third. It is clearly inaccurate to speak of the consequences here referred to as inevitable, for they could result from one only of three possible combinations.

It is however far safer, in judging upon constitutional questions, to rely on historical precedents than on merely speculative arguments. Our history furnishes abundant proof of the soundness of the principle of the balance of powers. In the first place, we have instances of the exercise of the power of the House of Lords to restrain the power of the Crown, and maintain the power of the Commons. In the second place, we have instances of the exercise of the power of the House of Lords to restrain the House of Commons from exceeding its constitutional authority.

1. First with respect to the exercise of the power of the Lords to restrain the power of the Crown. It is manifest from an attentive consideration of the circumstances attending the origin of the House of Commons and the establishment of its authority, that its constitution is due to the opposition to the arbitrary power of the Crown by the feudal barons and their successors. The Magna Charta of

this House to act in any ordinance wherein the Lords are joined, are hereby empowered and enjoined to sit, act, and execute, etc., notwithstanding the Lords do not join with them." January 4: the Commons resolve that whatsoever is enacted by the Commons in Parliament hath the force of law, without the concurrence of the King or House of Peers. February 6 (after the King's death): a bill is brought in to abolish the House of Peers in Parliament. (Parry's 'Parliaments,' under the respective dates.)

John was extorted from him by the barons; it has indeed been well described as a treaty of peace between the King on one side and the barons and people on the other(*a*). This Charta, it is true, contained no provision for calling an assembly for general legislative purposes; but it provided that there should be a Common Council of the kingdom to assess aids, to which the prelates, greater barons, and tenants-in-chief of the Crown should be regularly summoned. From this and many other provisions of this Charta, especially from those relating to the immunities of cities and boroughs and the freedom of commerce, it is manifest that the barons relied on the popular support of their cause, and sought to strengthen it by giving political power to large classes of the people.

We have seen that at the commencement of the following reign of Henry III. the Charter was confirmed, with the exception of some important provisions, including that for the convocation of national assemblies. The barons repeatedly compelled Henry to renew the Charter(*b*). In the forty-second year of that reign, a great assembly of the whole nobility of England, the prelates, and nearly one hundred barons, was held at Oxford, to reform the state of the kingdom. This Parliament—though Hume, in his tenderness of the kingly power(*c*), absurdly maligns it—evidently proceeded with great circumspection and moderation, and most important limitations of the power of the Crown were effected by it. A council elected by the King

(*a*) Report on the Dignity of a Peer, 62.

(*b*) Prynne, in his Plea for the Lords, p. 64 *et seq.*, has given a full account, authenticated by reference to records, of the proceedings of the barons throughout this long reign, with reference to the ratification and observance of Magna Charta. At the time when the statutes of Merton were made (20 Hen. III.), the barons unsuccessfully proposed some legislative measures infringing the Magna Charta, not (as Dwarris says) "in almost every possible particular," but in certain particulars relating to trespasses on land. Even supposing the measures so proposed by the barons to be totally inexcusable, the statement in the text remains unaffected, that they curbed the Royal power and increased that of the Commons. (See Dwarris on Statutes, 61.)

(*c*) 2 Hume's Hist. of Eng., 183.

and barons made ordinances binding the King to the observance of the Charter, and to convoke Parliament three times a year. It was provided also that in every shire four knights should make a report of grievances, which was to be presented to Parliament by the sheriff.

The faithless King endeavoured to resist these ordinances. The Earl of Leicester, who is admitted to have been revered by the people both in his life and after his death (*a*), formed a powerful party among the barons and the people to constrain the King to observe the Constitution. In 45 Henry III., Leicester summoned an assembly of three knights of every county to treat of the grievances of the kingdom. This assembly was countermanded by the King (*b*); but it may be probably regarded as the precursor of that of 49 Henry III., to which representatives of counties, cities, and boroughs were first summoned, and which is deemed the origin of the House of Commons (*c*).

In the following reign of Edward I., the power of the barons was similarly exerted. Headed by the Earls of Leicester and Norfolk, they compelled the King, notwithstanding his great reluctance, to renew the Great Charter (25 Edw. I., A.D. 1297), and obtained the enactment of the statute *de Tallagio non concedendo*, by which the King was restrained from imposing new taxes without the consent of the prelates, lords, knights, and burgesses (*d*). In the twenty-eighth year of the same reign, the Great Charter was again renewed by the King, "at the request of his prelates, earls, and barons" (*e*), by the *articuli super chartas*, and provision was made for election of sheriffs by the people.

The same resistance of the barons to the power of the Crown was exhibited in the succeeding reign of Edward II. At a Parliament of Peers, 3 Edward II., A.D. 1310, the

(*a*) 2 Hume, 216.
(*b*) Parry's 'Parliaments,' 41.
(*c*) See *supra*, p. 13.
(*d*) Parry's 'Parliaments,' 69; 2 Hume's Hist. of Eng., 292.
(*e*) 28 Edw. I. stat. 3.

barons extorted from the King power to elect twelve ordainers, who were to have power to frame ordinances for the reform of the kingdom. These ordinances were confirmed in a Parliament of Lords and Commons, 5 Edward II., and included an ordinance that Parliament should be held once every year, or twice if necessary(*a*).

From these and other instances which might be cited, it is abundantly evident that the establishment of the Magna Charta, and the authority of the House of Commons, was effected mainly through the instrumentality of the House of Lords. If we pass to the consideration of the next fundamental and permanent change in the Constitution, that established at the accession of William of Orange, we shall find that the peers had a large share in effecting it. During the interval between the flight of James II. and the arrival of William in London, the peers assumed the administration of government, and put forth a declaration of their readiness to concur with the Prince of Orange in attaining a free Parliament. On the arrival of the Prince, a council of about sixty peers met him in Council, to advise on the best means of settling the government; and two days after, by the advice of a council of ninety peers, a convention of members of Parliament was summoned(*b*), by which William III. was declared King, and the Bill of Rights, declaring the rights and liberties of the subject, and settling the succession of the Crown, was enacted.

It is not intended in this place to give a particular account of all the instances in which the House of Lords have opposed usurpations of power by the Crown, but the following additional instances may be briefly referred to:— The maintenance of the privilege of Parliament in the case of the Earl of Arundel, committed to prison by Charles I. without the cause of commitment being expressed(*c*); the

(*a*) 2 Hume, Hist. of Eng., 333; Parry's 'Parliaments,' 73.

(*b*) Burnet, Hist. of his own Time, London edition, 1850, p. 520, note; Parry's 'Parliaments,' 600, note; the State Letters of Henry Earl of Clarendon and his Diary, vol. ii. p. 114.

(*c*) The proceedings in Lord Arundel's case are fully stated in Prynne's

conferences between the Houses of Parliament upon the liberty of the subject, and their concurrence in the great Petition of Rights in the third year of Charles I.(*a*); the resolution of the Lords, to which the King assented in the sixteenth year of that reign, for securing the independence of the judges by the continuance of their offices during good behaviour(*b*); the resolutions of the Lords in that and the following year, vacating the judgment in Hampden's case, concerning ship-money as against Magna Charta(*c*); their appointment of a committee in the same year to move the King to assent to the Bill of Tonnage and Poundage(*d*); the investigation by the Lords of the institution and power of the Star Chamber (February 19, 1641), and their subsequent passing the bill from the Commons for abolishing that tribunal. Lastly may be mentioned the manner in which the House of Lords have upheld the power of the Commons to impeach persons accused of high crimes and misdemeanours against the state. The process of impeachment, which at several critical epochs has been found of the utmost importance for the repression of unconstitutional exercise of the prerogatives of the Crown by its ministers, would be wholly useless if the Crown had power to stop impeachments. Immediately after the House of Commons had directed an impeachment against Lord Treasurer Danby (30 Charles II., A.D. 1678), the King dissolved Parliament; but in the next Parliament the Lords resolved that the dissolution of Parliament did not alter the state of the impeachments brought up by the Commons in that Parliament(*e*); and shortly afterwards the Lords resolved that

'Plea for the House of Lords,' p. 23, and Hatsell's 'Precedents,' vol. ii. p. 142. Lord Arundel was committed to the Tower, 1625–6; the cause of his commitment was not expressed, but was supposed to be the marriage of his eldest son with a relative of the King. After a series of firm remonstrances against this commitment, as a breach of privilege of Parliament, Charles I. reluctantly released Lord Arundel.

(*a*) 3 State Trials, p. 1 *et seq.* (*b*) Parry's 'Parliaments,' 345.
(*c*) Parry's 'Parliaments,' 346, 347, 349; 3 State Trials, 1299.
(*d*) Parry's 'Parliaments,' 358. (*e*) 7 State Trials, 1230.

trials of impeachments may proceed without a High Steward, if the Crown refused to appoint that officer(*a*).

2. With respect to the exercise of the power of the Lords to restrain usurpations of unconstitutional power by the House of Commons, it is to be observed that, as the separation of the legislative power from the executive is essential to good government, it is no less important to the maintenance of the constitution that the House of Commons should be restrained from acquiring unconstitutional powers, than that the Crown should be so restrained.

Of such restraint of the Commons by the Lords there are abundant examples. We may first cite some which relate to impeachments, as that kind of trial has been just mentioned. While the House of Lords has been careful to preserve intact the power of impeachment by the Commons, it has been careful to require the Commons to proceed according to the regular forms of law. Thus, when the House of Commons proceeded against the Earl of Clarendon, in 1667, upon an impeachment, the Lords refused to commit the Earl of Clarendon, "because the accusation was only of treason in general, without charging anything in particular"(*b*). "The peers," says Burnet, "thought that a general accusation was only a clamour, and that their dignities signified little if a clamour was enough to send them to prison"(*c*). Again, in 1701, when the House of Commons had brought up impeachments against Lord Somers and others of the ministers of William III., without waiting for the judgment of the Lords, the House of Commons took the unprecedented step of addressing the Crown to dismiss those ministers from the King's Council for ever. The House of Lords deeming this an attempt to punish without trial in due course of law, and to subvert their judicature, addressed the King, praying him not to pass any censure on the Lords impeached until they had been tried. Their

(*a*) 7 State Trials, 1268. (*b*) 6 State Trials, 351.
(*c*) Burnet, Hist. of his own Time, A.D. 1667.

names were allowed to remain in the books of the Privy Council(*a*). At a later stage of the same impeachments, the House of Lords refused to agree with the Commons to name a committee of both Houses for settling the preliminaries of trial, on the principle, clearly correct, that a committee named by one of the parties to a trial to sit in equality with the judges to settle matters of procedure, was contrary to the practice of courts of justice(*b*).

The struggle between Charles I. and the Long Parliament of his reign has been the subject of so much debate, that it is difficult to refer to the constitutional principles at stake in that contest without involving political controversies, which it is the object of this work to avoid. This, however, seems free from reasonable doubt, whatever judgment be formed on the merits of the Long Parliament, that the absolute power which it obtained was mainly due to the Act 16 Charles I. c. 7, by which it was enacted that that Parliament should not be dissolved unless by an Act of Parliament for the purpose. If then it be allowed that a legislative body ought not to possess the functions of executive government, it follows that this perpetuation of the power of the Long Parliament was subversive of a fundamental principle of good government. When the bill in question was brought to the House of Lords, they proposed an amendment, that Parliament should not be dissolved within *two years* except by consent of both Houses(*c*). The power which the dominant party in the House of Commons had then obtained was so great, that the Lords were compelled to abandon that amendment.

As a further illustration of the influence of the Upper House in that reign to maintain the constitution, a former observation may be repeated, that previously to the trial of the King for High Treason, the House of Commons resolved to abolish the power of veto of the House of Lords(*d*).

We may now advert to a remarkable series of contests

(*a*) Burnet, A.D. 1701.
(*b*) *Ibid.*
(*c*) Parry's 'Parliaments,' 351.
(*d*) *Ante*, p. 76.

between the two Houses, in the reign of Queen Anne, from which it very plainly appears that the House of Commons at that epoch made great attempts to obtain arbitrary power, and were defeated by the admirable defence of the House of Lords of the most important rights of the people of England.

In the year 1702, the House of Lords resolved not to pass any money bill sent from the Commons to which any clause was tacked that was foreign to the bill. The object of this resolution was to prevent an abuse by the House of Commons of its exclusive power of originating and amending money bills. Some tacks(*a*) had been made to money bills in the time of Charles II. and William III., and had been protested against, in 1698, in the House of Lords; but in the reign of Anne the House of Commons endeavoured to compel the assent of the House of Lords to measures to which they were opposed, by tacking those measures to money bills to which they had no relation. Thus it was proposed (shortly after the resolution of 1702 was passed) to tack to a bill for a land-tax a bill against occasional conformity, the object of which was to exclude dissenters from offices under the Crown. Several bills against occasional uniformity had previously passed the Commons by large majorities, and been rejected by the Lords. Burnet observes that the object of this device of tacking was "a change to the whole Constitution, and was in effect turning it into a Commonwealth; for it imported the denying, not only to the Lords, but to the Crown, the free use of their negative in the legislature"(*b*).

Another usurpation of power attempted by the House of Commons about the same time related to elections for vacated seats in Parliament. By an ancient rule, when Parliament is sitting, and any vacancy in the House of Commons occurs by death or otherwise, the Speaker, by order of

(*a*) See instances cited 3 Hatsell, 218.

(*b*) Burnet, Hist. of his own Time, A.D. 1704. See to the same effect De Lolme on the Constitution, book ii. ch 17.

the House, issues his warrant for a new writ to supply the vacancy. The House of Commons about 1704 voted the elections for some boroughs void, on the pretence of corruption, and refused to order writs for new elections, "where it was visible that the election would not fall on the person they favoured" (*a*). In an address to the Queen, March 31, 1704, the House of Lords complained of this stoppage of the issue of writs by the Commons, "whereby they make themselves an imperfect representation, which is a wound to the Constitution, a wrong to the boroughs who have a legal right to send representatives, and an injustice to your Majesty, who has an undoubted title to the service and attendance of all the members." The address adds, "Who can say but in after-times an ill prince may take advantage of such precedents, and think himself justified in withholding his writs from some by as good law as the Commons can show for pretending to stop them from issuing to others?" (*b*)

But by far the most serious assault upon the Constitution at this time by the Commons, was in their proceedings in the great cases of Ashby *v.* White, and the Aylesbury Men. Ashby, a burgess of Aylesbury, brought an action, in 1704, against the returning officer of that borough in the Queen's Bench for hindering him from voting, and on appeal to the House of Lords obtained judgment against the returning officer. The House of Commons resolved that a question as to the qualification of an elector was cognizable only by themselves, and that whoever prosecuted actions for determining such questions at law, was guilty of breach of the privilege of that House. Notwithstanding this resolution, other burgesses subsequently prosecuted such actions, and for so doing they were committed to Newgate by the House of Commons. These burgesses sued out writs of *habeas corpus* to procure their discharge; but this endeavour was unsuccessful, and they were remanded to prison by the judgment of the majority of the judges of the Queen's

(*a*) Burnet, Hist. of his own Time, A.D. 1704.

(*b*) 14 State Trials, 962.

Bench, the Lord Chief Justice Holt dissenting. The burgesses then applied for a writ of error, to bring the judgment of the Queen's Bench before the House of Lords. The House of Commons resolved that no writ of error lay in this case, and prayed the Queen not to grant it. The Commons also carried their resentment so far as to commit to prison the counsel and solicitors concerned for the prisoners(*a*).

The extent of the jurisdiction of the House of Commons of questions of the qualification of electors, is not free from doubt even at the present day; but this is free from doubt, that the methods which that House took for asserting its jurisdiction in 1704, were gross violations of the Constitution, as was conclusively shown in the masterly address of the House of Lords, presented to the Queen March 17, 1705. The warrant of the House of Commons for committing the burgesses, alleged as a ground of commitment that the actions were brought contrary to a declaration of the House of Commons. If such a ground were allowed, the Commons had power to alter the law by their declaration, for the point of law on which those actions were founded had been already settled by the judgment pronounced in the case of Ashby *v.* White, by that court which the Constitution makes the court of last resort. "It was never heard," says the address of the Lords (when there was a House of Lords in being and a King or Queen upon the throne), "that the House of Commons alone claimed a power, by any declaration of theirs, to alter the law, or to restrain the people of England from taking the benefit of it. . . . The certainty of our laws is that which makes the chief felicity of Englishmen; but if the House of Commons can alter the laws by their declarations, or (which is the same thing) can deprive men of their liberty if they go about to take the benefit of them, we shall have no longer reason to boast of that part of our Constitution."

Another violation of law in these proceedings was the endeavour to stop the appeal by writ of error from the judg-

(*a*) 14 State Trials, 695.

ment of the Queen's Bench, by which the prisoners had been remanded. Writs of error for the purpose of appealing from judgments of inferior tribunals are writs of right, to be granted *ex debito justitiæ*, and not of grace and favour. And so the Lords showed in their address, and so ten of the twelve judges certified to the Queen, upon a reference by her to them for the purpose, February 1704-5 (*a*).

Two of the counsel in these proceedings who had been committed to prison, with a view to their own liberation, caused the Serjeant of the House of Commons to be served with writs of *habeas corpus;* the House directed the Serjeant not to yield any obedience to the writ.

The Lords' address to the Queen comments with great severity on these latter proceedings, on the ground that the denial of legal assistance to the burgesses was an injustice to them, and that the votes of the House of Commons imported a direct repeal of the laws made for the protection of liberty by means of writs of *habeas corpus*. The address concluded by praying the Queen to order the issue of the writs of error. She replied, "I should have granted the writ of error desired in this address, but finding an absolute necessity of putting an immediate end of this session, I am sensible there could have been no further proceeding upon this matter" (*b*). Immediately afterwards the Queen ended the session in a speech, in which she regretted the dissensions of the two Houses, and then that Parliament was dissolved (*c*).

Lord Campbell, in his Life of Lord Somers, speaks of the proceedings of the House of Commons in this case as an attempt by an "ultra-Tory House of Commons, by an abuse of Parliamentary privilege, to encroach on the just rights of the subject" (*d*). It may be added, that the proceedings of the House of Lords were a noble defence of those rights.

(*a*) 14 State Trials, 862 *n*. (*b*) *Ibid.* 878.
(*c*) Burnet, Hist. of his own Time, A.D. 1705.
(*d*) Campbell's 'Lives of the Chancellors,' vol. iv. p. 181.

The historical instances just cited appear to abundantly justify the position that the power of the House of Lords has tended to maintain the balance of the Constitution in this sense,—that the power of the House of Lords has, in many critical cases, been exerted to protect the powers of the executive and legislative government from mutual encroachment. It may be objected that in many of the instances cited, the House of Lords was actuated by a desire to maintain, not the balance of the Constitution, but their own power. This objection, however, only shows that the House of Lords has a never-failing motive for maintaining the balance of the Constitution; and therefore, instead of invalidating the inference just drawn, confirms it.

Of the remaining arguments for the constitution of the House of Lords, the most considerable is thus expressed by De Lolme. He says, that on account of the division of the legislature into three parts, "they will therefore be led to offer to each other only such propositions as will at least be plausible; and all very prejudicial changes will thus be prevented, as it were, before their birth. . . . Besides, when one of these parts of the legislature is so successful as to engage the others to adopt its proposition, the result is that a law takes place which has in it a great probability of being good; when it happens to be defeated, and sees its proposition rejected, the worst that can result from it is, that a law is not made at that time, and the loss which the state suffers thereby reaches no further than the temporary setting aside some more or less useful speculation"(*a*).

Mr. Bentham, in his 'Constitutional Code'(*b*), collects several arguments against the division of the legislature. Of these arguments, those which have not been already considered may be here briefly mentioned. He considers that the chamber not elected by the people would serve to screen the monarch from the just resentment of the people; to which it may be answered, that the modern principle of

(*a*) De Lolme on the Constitution, book ii. ch. 3.
(*b*) Book i. ch. 16.

making the ministers of the Crown responsible to the House of Commons, is more effectual for securing the power of the legislature than the principle of making the Sovereign personally responsible. To his argument that the Upper Chamber, by the splendour of its dignities, would exercise an undue influence on the people, it may be replied that if the Lords were admitted into the House of Commons, as they must be(*a*) if they had not a separate chamber, they would be far more influential to resist popular measures than at present. Indeed, the influence of the Lords against popular measures has been (especially before the passing of the Reform Acts of 1832) most sensibly exerted by their power as individuals, in returning members to the House of Commons, not by their power in their aggregate capacity as a branch of the legislature.

Among Mr. Bentham's arguments are the following:—that the only benefit ascribable to a second house is its acting as a remedy against precipitation; but that if the principal house be chosen of the most apt men, that aptitude is a protection against precipitation. He argues also that if the first house be selected in a manner calculated to procure the best men, the second house must be selected in a manner inferior, or, at the utmost, only equally good.

It may be replied, that the remedy against precipitation is not the only benefit ascribable to a division of the legislature, the balance of power being at least an equal benefit. Next, the remedy against precipitation, even were there but one House, would consist in the selection, not only of the most apt men, but also of so many of them as to secure the exercise of many minds in the debate and revision of every measure adopted. The characteristic principle of legislation by a "Parliament" (as the name implies), as distinguished

(*a*) In 1649, when the Commons resolved that an Act should be brought in for abolishing the House of Lords, they declared that peers should have the privilege to be elected knights and burgesses, of which concession some of them took the benefit soon after. (Clarendon, Hist. of the Rebellion, vol. iii. 345, Oxford ed., 1816.)

from legislation by absolute lawgivers, is, that the former is the result of debate, and the comparison of diverse opinions. The division of the legislature is but an extension of that principle. However the first chamber be selected, it is clear that the submission of its measures to further debate in a second chamber is an additional remedy against precipitation, even though the legislative capacity of the second chamber be not superior to that of the first chamber.

Moreover, it will be found on examination, that every one of Bentham's arguments against a second chamber applies equally to legislation by assemblies instead of single lawgivers. The advantage of unity of the legislature, the disadvantage of delay, and complication of legislation—which are arguments on which he relies—are arguments for assigning the legislative power to a single lawgiver. Yet a prudent nation will distrust its own power of selecting any one man fit to have so tremendous a power, and will provide against probable errors in its choice of legislators by multiplying their number.

The most obvious objection to the constitution of the House of Lords,—an objection raised elsewhere by Mr. Bentham,—is the hereditary succession of peers. It is said that the accident of birth does not ensure the requisite qualities of a legislator; but the only useful way of considering this question is by reference to observed facts, not to mere speculation. The peerage is constantly recruited from the other classes of society, as has been shown in a previous part of this chapter; the hereditary peers who take frequent part in the debates of the House of Lords are usually men who have previously acquired distinction in the House of Commons or the courts of law; and the annals of Parliament, from the earliest times, are full of illustrious examples of orators and constitutional statesmen who have swayed the counsels of the House of Lords(*a*).

(*a*) An important argument in favour of a division of the legislature is derived from its general adoption in constitutional forms of government, ancient and modern. In the ninth year of the Commonwealth, Cromwell

Of course hereditary rank is a purely artificial and indirect test of moral and intellectual qualifications; but so are many other similar tests adopted in our law; for instance, the property qualification of jurors. It is not a sufficient objection to that test that men who are morally or intellectually unfit to be jurors may by accident possess the legal qualification; experience, which is the only safe guide in such matters, shows that the property qualification of jurors does ordinarily answer its intended purpose; and therefore we may infer that the objection to arbitrary nature of the analogous qualification of peers is at least not conclusive.

(3) *Assistants.*—Besides the temporal and spiritual peers, certain persons have, from very early periods, been summoned to Parliament as "Assistants" to the King and the House of Lords. Anciently, these Assistants were most usually the King's great officers, clerical and secular, who were not lords or barons of the realm. In later times, all the King's Justices, Barons of the Exchequer, Serjeants-at-law, the Master of the Rolls, the Attorney-General and Solicitor-General, and some Masters in Chancery, have usually been summoned to advise the King and the Lords in matters of law, and also to carry messages, bills, and orders from the Lords to the Commons, and to return answers to them. The assistants have no vote in the determinations of the House of Lords, and, with the exception of the judges, are not precluded from sitting in the House of Commons. In former times the judges were occasionally consulted by the House of Lords upon bills of a public nature, but in modern times their advice has been taken principally with respect to certain private bills and questions of law arising in appeals to the House of Lords. The judges, as attendants of the House of Lords, carry prerogative bills relating to the Crown and the Royal family to the other House of Parliament; but ordinary messages were entrusted to the masters in Chancery, previously to the abolition of their

constituted an Upper House to interpose "between him and the tumultuous and popular spirits in the Commons' House."

offices. Provision is now made for carrying such messages by clerks of the House of Lords(*a*).

(4) *Speaker.*—The Lord Chancellor or Lord Keeper is, by prescription, Prolocutor or Speaker of the House of Lords. If he be prevented from attending, a deputy-speaker is appointed by Royal Commission to officiate in his place during the Royal pleasure. The deputy-speakers are usually the chief judges of the courts of Westminster, and generally three are appointed, with authority to act in the absence of the Lord Chancellor; the second deputy-speaker, in the absence of the first; the third, in the absence of the first and second. When the Chancellor and deputy-speakers are all absent, the Lords elect a speaker *pro tempore.*

The Speaker is not necessarily a peer. In the last century the Lords Keepers Wright and Henley acted for many years as speakers, though not elevated to the peerage. In 1830, Lord Chancellor Brougham sat as speaker for one day before he had been created a peer.

The Speaker has not (as in the House of Commons) a power of deciding points of order, and the Lords address their speeches, not to him, but to the House generally. He communicates Royal addresses, puts questions to the vote, declares adjournments, and performs various functions of a ministerial character(*b*). If he be a peer, he may speak and vote as any other peer; and he has not a casting-vote in the case of equality of votes on a division. The equality of votes is held equivalent to a majority of non-contents, the maxim of the House of Lords being "*Semper præsumitur pro negante.*"

(*a*) Parry's 'Parliaments,' xx.; Macqueen on Appellate Jurisdiction, ch. 3.
(*b*) Macqueen, Appellate Jurisdiction, ch. 2.

CHAPTER VIII.

THE CONSTITUTION OF THE HOUSE OF COMMONS.

THE House of Commons since 49 Hen. III. has regularly consisted of knights of the shire, or representatives of counties; citizens, or representatives of cities; and burgesses, or representatives of boroughs, and representatives of the Cinque Ports, who all sit and vote together.

For a long time after knights, citizens, and burgesses obtained the privilege of a customary summons to the Parliaments, they were elected only "ad faciendum quod de communi concilio ordinabitur," whereas the peers were summoned "locuturi et super prædictis negotiis tracturi."

Since the enactment of the statute 7 Hen. IV. c. 15, A.D. 1406, regulating the manner of the election of knights of the shire, numerous statutes have been passed regulating the election of members of Parliament. But previously to that enactment the Crown had a very large and absolute power in limiting and prescribing, by the royal writs, the numbers and qualifications of the persons to be elected, and of the constituencies. Not only the numbers elected for particular counties, cities, and boroughs varied, but a power was for a long time assumed of omitting to send writs to places which had previously elected members, and of creating, by patents or writs, or both, new constituencies(*a*). For a long period after the constitution of the House of Commons the adjudication of controverted elections was

(*a*) Parry's 'Parliaments,' Introduction.

not in that House, but by the Kings, or their Councils, together with the House of Lords(*a*). It has been already pointed out that by a statute, 6 Rich. II., A.D. 1382, the returns to Parliament were to be such as had been accustomed in ancient times.

The distribution of the franchise in counties has always been far less variable and irregular than in boroughs. The earliest writs for the election of representatives of both counties and boroughs required *two* representatives to be elected for each; and down to the time of the passing of the Reform Acts, the regular number of representatives of English counties was (with one exception) two for each county. When Wales was incorporated with England, in the reign of Henry VIII., one representative was given, by statute, to every county of Wales (with one exception)(*b*). Upon the union of Scotland with England, by 5 Anne, c. 8, and of Ireland with Great Britain, by 40 Geo. III. c. 67, the distribution of the franchise among the counties of Scotland and Ireland respectively was strictly regulated by those statutes. Thus, though the general system of county representation was not perfectly uniform throughout the kingdom, it was defined by law according to a method, and not merely capriciously.

For cities and boroughs, however, the constituencies varied greatly from time to time, and in incorporated boroughs depended chiefly on custom and the terms of their charters. In some cases, the freeholders in burgage tenure returned members; in others, the inhabitants at large; in others, members of the Corporation(*c*). The

(*a*) See further as to this jurisdiction the fifth part of this chapter relating to controverted elections.

(*b*) 27 Hen. VIII. c. 26.

(*c*) In the case of Ashby *v.* White, in the House of Lords, A.D. 1704, it was laid down that every city is a borough, and, as such, sends members to Parliament. There are two sorts of boroughs: the more ancient hold their lands in burgage, and by reason thereof had the right of sending burgesses to Parliament; the more modern have by prescription or by charter a right belonging to their corporations of sending burgesses. (2 State Trials, 782.)

variations in the number of cities and boroughs sending representatives were due partly to the caprice of sheriffs. They, by the authority of the King's writs received by them, directed precepts to cities and boroughs, and arbitrarily omitted some and added others. As a remedy for this evil, it was provided by 5 Rich II. stat. 2, c. 4, that if any sheriff left out of the returns of writs of Parliament any cities or boroughs which were bound, and of old time were wont to come to the Parliament, he should be punished.

Another cause of the diversities in question was the inability of poor boroughs to pay the expenses of their representatives. Such boroughs were frequently discharged by the sheriffs from sending members, or, upon petition to the Crown, obtained temporary or perpetual exemption.

Again, in some ancient boroughs and ports, after a discontinuance of one or two hundred years, the power of sending representatives was revived by special charters, by the general clause in the writ to the sheriffs, or, as in the reign of Charles I., by the order of the House of Commons(*a*).

The number of cities, boroughs, and ports for which writs were issued in the time of Edward I., and thence to Edward IV., appears to have been 170(*b*). At the accession of Henry VIII., the total number of constituencies, including counties, had become reduced to 147. In that reign the number was considerably increased, principally by the addition of representatives for Wales. In all the following reigns up to the Restoration, large additions of borough franchises were made, of which particulars are given in a note appended. The practice having grown up of members bearing their own expenses, many ancient boroughs, which had formerly been exempted from the returns on account of their poverty, became desirous of

(*a*) The authorities for the preceding paragraphs of this chapter are the statutes cited; the Lords' Report on the Dignity of a Peer; and the introduction to Parry's 'Parliaments.'

(*b*) Parry's 'Parliaments,' xxx. 334, 344.

resuming their franchises. In the fourth Parliament of Charles I., the number of places in England and Wales for which returns were made, exclusive of counties, were 210; and in the time of the Stuarts, the total number of members of the House of Commons was about 500(*a*).

The number of members was not materially altered from that time until the union with Scotland, in the reign of Queen Anne, when 45 representatives of Scotland were added. The next considerable change was at the union with Ireland, at the commencement of the present century, when the House of Commons was increased by 100 Irish representatives(*b*). The number of members of the House has remained nearly the same ever since; but at the passing of the Reform Acts, which will be considered presently, extensive alterations were made as to the places represented.

The franchise of returning members to Parliament having, as we have seen, depended on a variety of fortuitous circumstances,—the will of the Crown, the caprice of the sheriffs, or the unwillingness of some boroughs to send representatives,—it was inevitable that the distribution of the fran-

(*a*) D'Ewes, Journals, p. 80; Parry, 540, 597. In the Parliament of 1620 the number of members was 478. (2 Hatsell's 'Precedents,' 178 *n.*)

(*b*) Hatsell, in his 'Precedents,' vol. ii. p. 413, gives a summary of the number of constituencies and members in different reigns, as follows:—

	Constituencies.	Members.
Accession of Henry VIII.	147	296
Added in reign of Henry VIII. . . .	32	38
Edward VI. . . .	22	44
Mary	14	25
Elizabeth	31	62
James I.	14	27
Charles I.	9	18
Charles II.	3	6
Anne	—	45
George III. . . .	—	100
Total . .		661

The number of members in 1817 was 658. The additions from Edward VI. to Charles I., inclusive, were almost entirely of borough members.

chise should be marked with great irregularities. These, together with the anomalies in the qualifications of borough electors, and their venality or dependence on powerful patrons in many cases, have for centuries been the subjects of frequent complaints.

In the reign of Queen Elizabeth, and the succeeding reign (as we have seen), the allowance to members for their expenses having for the most part ceased, many boroughs which, to avoid those expenses, had discontinued sending representatives, again began to send them. Many of these boroughs had become very small places at the time when they resumed their privilege. In a debate, in the third Parliament of Queen Elizabeth, upon the subject of Parliamentary reform, it was contended that decayed boroughs ought to be disfranchised, and instances were cited of attempts at nomination by noblemen and the Queen's Council; and it was proposed that there should be a penalty of £40 on every borough that made election at the nomination of any nobleman. Shortly afterwards, a fine was imposed by the same House of Commons on a borough which had sold a place in Parliament for £4(*a*).

One of the subjects of the representation of Fairfax and his army to the Long Parliament, A.D. 1647, was that the franchise should be distributed "according to some rule of equality," and that burgesses "should be taken off poor and inconsiderable towns, and additions made to counties"(*b*).

In the second Parliament under the Commonwealth, A.D. 1654, writs were omitted to be sent to many of the small boroughs. A large proportion of the members for

(*a*) Parry's 'Parliaments,' 218–222. Complaints of the nomination of members of the House of Commons by the Crown were made at a much earlier date. One of the articles exhibited against Richard II. in Parliament, 1 Hen. IV., alleged that Richard, "that in his Parliaments he might be able more freely to accomplish the effects of his headstrong will, did very often direct his commands to his sheriffs that they should cause to come to his Parliaments, as knights of the shire, certain persons by the said King named." (1 State Trials, 145.)

(*b*) Parry's 'Parliaments,' 478.

the counties and cities were nominated by Cromwell and his officers(*a*).

In the second Parliament of Charles II. a bill was brought in, in 1669, to prevent abuses and extravagancies in electing members(*b*). Again, information is given in the House of Commons, January 18, 1671, of endeavours to forestal a free election by papers, in the nature of warrants; and the House resolved that this is a violation of the rights of election. Again, in 1674, complaint is made in the same Parliament of the expense of elections, and that some are carried "by awe and force, and some by ability and expense," and that a number of decayed boroughs are revived since they are not burdened with the expenses of their members. In the following year it is said in debate, that "exorbitant corruption exists;" the bribing of men by drinking is designated lay-simony, and it is resolved that the giving meat and drink, exceeding £5 in value, to electors, shall void an election(*c*). Another resolution for avoiding elections on the ground of bribery or treating was passed by the same House of Commons in 1677(*d*).

The Bill of Rights is very indefinite on the important subject of Parliamentary elections. It is recited that the late King violated the freedom of election of members to serve in Parliament, and it is declared, (Art. 8) "That election of members of Parliament ought to be free;" (Art. 13) "That for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliaments ought to be held frequently." These are the only provisions of that great statute referring to Parliamentary elections.

In the reign of William III., Parliamentary corruption continued to be common. The House of Commons, elected corruptly, was itself corruptible. Sir John Trevor, Speaker of the House of Commons, made an agreement with the King to buy off votes of members. Burnet says he re-

(*a*) Parry, 513. (*b*) *Ibid.*, 559; Clerk's Law of Elections, 111.
(*c*) Parry's 'Parliaments,' under the respective dates.
(*d*) Parry, 580; Clerk, Law of Elections, 111.

monstrated with the King, who replied that he hated this method, but that it was unavoidable(*a*). In 1695, in consequence of the abuses of elections, which were grown to intolerable excesses(*b*), an Act was passed for voiding all the Parliamentary elections where the elected had been at any expense in meat, drink, or money to procure votes. The first Act of Parliament against treating at elections is this statute. For some years previously many elections had been avoided on petition, but principally on the ground of misconduct of the returning officers, and in some cases for bribery; but it is remarkable that in no case was an election questioned on account of *treating*, or, as it was then called, debauchery at elections, though unquestionably the abuse had extensively prevailed(*c*).

These references suffice to show the antiquity of abuses of our electoral system. To come nearer to our own times, we may advert to the efforts made by Mr. Pitt in the commencement of his career to procure reform in Parliament. These efforts commenced before he became Prime Minister. In 1785, upwards of a year after his accession to that office, he brought in a bill to amend the representation, proposing an extensive redistribution of the franchise and disfranchisement of small boroughs. A part of his plan was the compensation in money of the proprietors of these boroughs(*d*). The compensation of the possessors of small boroughs had formed part of a previous scheme of the Duke of Richmond, for a most extensive change of the constitution of the House of Commons(*e*). Mr. Pitt's Reform Bill was rejected in the House of Commons by a large majority.

(*a*) Burnet, Hist., A.D. 1690. Our Parliamentary history has been tainted with this disgrace from the reign of Charles II. far into that of George III. (1 May's 'Constitutional History,' 312.)

(*b*) Burnet, A.D. 1695. (*c*) Clerk, Law of Elections, 113.

(*d*) Lord J. Russell's Life of Fox, vol. ii. ch. 24; Stanhope's Life of Pitt, ch. 7.

(*e*) See Letter of Duke of Richmond to the Delegates of Volunteers in Ireland, August 15, 1783. (24 State Trials, 1048.)

A few years afterwards, when much public excitement had been caused in this country, a number of political societies sprang up, having for their object the reform of the House of Commons. The proceedings of the principal of these societies—the Constitutional Society and the London Corresponding Society—led to a remarkable series of prosecutions of some of their members, including Horne Tooke and Hardy for high treason in 1794. These trials, and similar trials about the same time in Ireland and Scotland, disclosed the organization of a very widely extended agitation in all parts of the United Kingdom for Parliamentary reform(*a*). Among other remarkable statements made on those trials respecting the state of the representation, it was alleged, apparently on sufficient authority, that at that time almost one-half of the House of Commons was returned by the influence of about 200 persons(*b*).

In the early part of the present century the agitation for Parliamentary reform was renewed, and Sir Francis Burdett became conspicuous among its leaders, and in the House of Commons multitudes of petitions for the amendment of the representation were from time to time presented by him and others(*c*). From 1820 to the passing of the Reform Acts, the cause of reform was continually advocated in Parliament by Lord John Russell. At length, in 1831, Lord Grey being then Prime Minister, Lord John Russell brought forward the first of the series of bills for the reform of Parliament, the last of which, after many vicissitudes, was enacted in the following year. The first of these Reform Bills was defeated in the House of Commons, and immediately afterwards Parliament was dissolved. In the succeeding House of Commons the second Reform Bill was carried by a large majority, but it was defeated in the House of Lords. Parliament was thereupon prorogued for a short time, and in the next session the third Reform Bill was brought into the House of Com-

(*a*) State Trials, vols. xxii.-xxiv.
(*b*) 24 State Trials, 919.
(*c*) See 2 Hatsell, 189 *n*.

mons at the end of the year 1831, and passed shortly afterwards. The opponents of the bill in the House of Lords, induced partly by apprehension of a great increase of peers being made in order to procure a majority favourable to the bill, and partly by the private persuasion of the King (William IV.), withdrew their opposition, and the Reform Act for England (2 Will. IV. c. 45) was passed in the early part of the year 1832. It was followed shortly afterwards, in the same year, by the enactment of statutes for the amendment of the representation of Scotland and Ireland(*a*).

The effect of these statutes, and the present constitution of the House of Commons, remain to be considered(*b*). It will be convenient to treat of this subject under the following divisions:—1. The Places represented. 2. The Qualifications of the Electors. 3. Elections. 4. Bribery, and Corrupt Practices at Elections. 5. Controverted Elections. 6. Qualification of Members. 7. Vacation of Seats. 8. Oaths taken by Members of Parliament. 9. The Speaker of the House of Commons.

1. *The Places represented.*—The reform increased the English county constituencies from fifty-two to eighty-two, by dividing several counties into separate electoral divisions, and by increasing the number of county members from ninety-four to one hundred and fifty-nine. In Scotland and Ireland the numbers of county constituencies and members remained unaltered.

By the reform, fifty-six English boroughs, containing a population in 1831 of less than 2000 each, were totally disfranchised; they had returned 111 members collectively.

(*a*) Roebuck's Hist. of the Whig Ministry of 1830.

(*b*) The law relating to the election and constitution of the House of Commons is regulated by a vast number of statutes and judicial and Parliamentary decisions, and only the more important parts of this extensive subject are here briefly considered. For fuller information respecting it, the reader is referred to 'The Law and Practice of Elections, Election Committees, and Registration,' by Francis Newman Rogers, 7th edition, 1852; and a 'Manual of the Practice of Elections,' by Henry Jeffreys Bushby, 2nd edition, 1859.

In thirty boroughs, containing a population of less than 4000 each, the franchise was reduced to the sending one member instead of two each. To twenty-two new boroughs, containing each 25,000 persons and upwards, the franchise of returning two members each was given. To twenty-one new boroughs, containing each 12,000 persons and upwards, the franchise of returning one member each was given.

In Scotland, the town representatives were increased from fifteen to twenty-three, so that the number of representatives became eight more than the number (forty-five) assigned to Scotland at the union with that country.

In Ireland no new boroughs were created, nor were any disfranchisements enacted; but two members each instead of one were assigned to forty-five large towns and the University of Dublin.

Since the Reform of 1832 two towns in England have been disfranchised for bribery. Four seats were thus vacated; this number of vacancies has been supplied by additions to the borough and county franchise(*a*).

The total number of representatives in the House of Commons is now as follows:—

	Of Counties.	Of Cities and Boroughs.	Total.
England	162	338	500
Scotland	30	23	53
Ireland	64	41	105
Total for the United Kingdom . .			658

Many great disparities still exist in ratios of the elected to the electors in different constituencies. Thus, in some large towns, the ratio is one to between six and seven thousand. In some small boroughs it is considerably below one to two hundred, so that the ratio is more than thirty times

(*a*) Sudbury, disfranchised 7 & 8 Vict. c. 53; St. Albans, disfranchised 14 & 15 Vict. c. 106. By 24 & 25 Vict. c. 112, entitled "An Act for the Appropriation of the Seats vacated by the disfranchisement of the Boroughs of Sudbury and St. Albans," Yorkshire has two additional members, Lancashire has one, and Birkenhead is made a borough, returning one member.

as great in some boroughs as in others. Again, in England and Wales, each member represents, on the average, three times as many electors, and three times as many persons, in the counties as in the boroughs; whereas the property qualifications are higher in the counties than in the boroughs.

Several bills have been brought into Parliament since 1832, by which it has been proposed to make further changes in the distribution of the franchise of returning members to Parliament. In 1852, Lord John Russell brought in a bill, by which it was proposed that every borough having less than 500 electors should be associated with adjacent places in electing its representatives. In 1854, a bill was brought into Parliament by Lord John Russell, by which it was proposed to disfranchise nineteen small boroughs, having twenty-nine members; to disfranchise thirty-three other boroughs as to one member for each; and to distribute the vacant seats among the Counties, the larger Boroughs, the Inns of Court, and the University of London. In 1859, the government of Lord Derby proposed to take from each of fifteen boroughs, returning two members, and having a population of less than 6000, one member, and to assign eight new seats to counties, and seven to new boroughs. In 1860, a bill was introduced by Lord John Russell, under Lord Palmerston's administration, by which it was proposed to deprive each of twenty-five boroughs, having a population under 7000, of one of its members, and to give fifteen of the seats to counties, and ten to new boroughs. None of these measures for a general reform of the House of Commons passed the House of Commons (*a*).

2. *The Qualifications of the Electors.*—The laws defining the classes of persons entitled to vote for members of the House of Commons are so numerous and complicated, and have been interpreted by so many judicial decisions, that a complete account of those laws must be sought for in the

(*a*) May's Constitutional History, ch. 6.

special treatises relating to them. In this place it is proposed to give only a general account of the more important particulars of the qualifications of Parliamentary electors.

In the first place, it will be convenient to speak of the qualifications of the electors of English *counties*. It is generally agreed that, according to the original constitution of the House of Commons, the electors were all the suitors or persons owing suit in the county courts or courts-baron of the King, which the tenants-in-chief of the Crown, but not the tenants of mesne lords, were bound to attend(*a*). This supposition is an almost inevitable inference, from the circumstances of the origin of the House of Commons, stated in a previous chapter.

A statute of 1406, 7 Hen. IV. c. 15, for regulating the manner of electing knights of shires, provided that the election should be proclaimed in the county courts, and the electors were to be all those that were there present, as well suitors duly summoned for that cause as others(*b*).

After many variations in practice, an important statute, 8 Hen. VI., provided that the knights should be elected in every county by people resident therein, having each a freehold to the value of forty shillings by the year; and in a subsequent statute, 10 Hen. VI., this freehold was required to be in the county for which the election was made.

Until the passing of the Reform Acts, the electors of counties were only those who were popularly termed the "forty-shilling freeholders," or those who had freeholds of the clear value of forty shillings by the year in the counties in which they voted: leaseholds and copyholds did not entitle to county suffrage.

(*a*) Parry's 'Parliaments,' Introduction; First Report on the Dignity of a Peer, p. 188, where the opinion is expressed that probably tenants-in-chief of the Crown were the only electors of knights of the shire; and freeholders who were subtenants of earls and barons, were considered to be represented by their superior Lords.

(*b*) "Toutz ceux qe illoeques sont presentz sibien suterez duement somonies pur cele cause come autres."—7 Hen IV. c. 15.

The Reform Act greatly extended the county suffrage. With a few modifications, it retained the former qualifications of the forty-shilling freeholders; and, with regard to those persons who under the old law had rights of voting at the time of the passing of the Act, retained their rights for their lives. This principle of preserving *existing* rights was observed with respect to all classes of voters, subject to the indispensible requisite of *registration*, which will be noticed hereafter.

The former law gave the right to vote to freeholders, whether their freeholds were estates of inheritance, or only held for a life or lives. But with respect to the latter, the Reform Act introduced this modification,—that for the future they must be of the annual value of ten pounds, unless occupied by the freeholders, or acquired by marriage, marriage settlement, devise, or promotion to any benefice or office.

The following new qualifications of county voters were added by the Act:—Copyholds of the annual value of ten pounds; leaseholds of the annual value of ten pounds, where the original lease was for sixty years; leaseholds of the annual value of fifty pounds, where the original lease was for twenty years. But sub-lessees of both kinds of leaseholds must be in actual occupation of them to be entitled to vote.

A very important addition to the county constituencies was made by what is known as the Chandos Clause, which was carried in the House of Commons by the Marquis of Chandos, as an amendment to the bill proposed by the Government. By this clause, the right of voting in their counties was given to occupying tenants of lands and tenements held at the annual rent of fifty pounds (*a*).

Where an estate which gives the necessary qualification is held on trust, it gives the right to vote, not to the trustee, but to the beneficial owner. A mortgaged estate confers the right to vote on the mortgagor or the mortgagee,

(*a*) Roebuck's Hist. of the Whig Ministry of 1830, p. 198.

accordingly as the one or the other is in possession of the estate(*a*).

Property which would confer a borough vote, is in various cases excluded from conferring a county vote. Freeholds in boroughs are so excluded only where they are occupied by the freeholders; but as to other qualifications—copyholds, leaseholds, and tenancies in boroughs—the exclusion exists irrespectively of such occupation (*b*).

At the time of the passing of the Reform Acts, the qualifications to vote in boroughs were far more anomalous than in counties. We have already pointed out some of the diversities of these qualifications in boroughs, and that they depended chiefly on local customs and charters. In some cases the qualification had been extremely low, and extended to all inhabitants paying "scot and lot" or parochial rates, or all "potwallers," *i. e.* providing their own food(*c*); in other cases the voters were restricted to a few members of a corporation. By the Reform Acts it was intended to remove these strange anomalies, and create ultimately a uniformity of the constituencies of boroughs. The Act retained the rights to votes existing at the time of its passing, for the lives of the persons entitled. For the future, a new uniform qualification was created, which is frequently designated that of the "ten-pounds householders." Subject to certain restrictions, every man occupying as owner or tenant a tenement or lands within a borough, of the clear yearly value of ten pounds, may vote for the borough. The restrictions are these:—the occupier must not be subject to legal incapacity; he must be duly registered; he must be duly rated to the poor-rate, and have paid the rates and assessed taxes for a certain time previously to registration; he must continue to reside in the borough, or seven miles of it, for a certain period prior to the election(*d*).

(*a*) 6 & 7 Vict. c. 18, s. 74.
(*b*) 2 & 3 Will. IV. c. 45, ss. 24 & 25.
(*c*) Rogers on Elections, 7th edition, 198, 199.
(*d*) *Ibid.* 185.

Registration.—The Reform Act established a general system of registering voters, both of counties and boroughs; but the law as to registration has been greatly modified by subsequent statutes. No person whatever can vote unless his name has been duly registered on the proper list of voters.

In counties, the overseers of every parish give notice annually, requiring all persons claiming to vote in respect of lands in that parish, to send in their claims within a time limited. In boroughs, similar claims are sent to the town clerks. The lists of these claims are published. Revising barristers are appointed to hold local courts at stated periods in every year, for the purpose of revising these lists. The revising barristers are required to correct any mistakes proved to have been made in any list, and to expunge the name of every person not qualified or dead. Every decision on points of law by the revising barristers is open to appeal to the Court of Common Pleas(*a*).

Scotland.—The qualifications of electors in Scotland, before the Reform of 1832, were subject to anomalies even more strange than those which existed in England. The county franchise in Scotland consisted in property, *or* "superiority" of lands of forty shillings old extent, or 400 pounds Scots, valued rent. The "superiorities," being enjoyed independently of property or residence, were openly bought and sold, or were parcelled out by great proprietors, so as to multiply votes. Consequently, the number of persons directly interested in the property of the soil was extremely small, and the fictitious votes were nearly as numerous as the rest of the votes. Again, in boroughs the franchise was vested in self-elected Town Councillors; and where there was a district of burghs, each Town Council elected a delegate, and the four or five delegates elected the member. The great mass of the people had no part in the election of representatives, and their return was

(*a*) Rogers on Elections, ch. x. The registration of electors in England and Wales is now principally regulated by 6 & 7 Vict. c. 18.

very commonly a matter of bargain between the few electors and the Government(*a*).

The Scotch Reform Act(*b*) assimilated the general character of the county suffrage to that of England. While existing rights of voting in counties were preserved to freeholders for their lives, it was provided that for the future the electors' qualifications should be ownership of hereditaments of the value of £10 a year; leaseholds for fifty-seven years or for life, of the like value; leaseholds for nineteen years, of the value of £50 a year; tenancies from year to year of lands, at a rent of £50 a year; and all tenancies, wherever the interest of the tenant in the land has been purchased for a sum not less than £300.

In boroughs, the right of voting was taken away from the Town Councils and delegates, and was vested in the qualified inhabitants. The qualification consists in the occupation, as owner or tenant, of tenements worth £10 a year.

The qualified persons in counties give in their claims to the schoolmasters of their parishes, and in boroughs to the town clerks. The lists of claims are revised by the sheriffs, and their decisions are open to appeal to the circuit courts of justiciary(*c*).

In Ireland, before the Reform of 1832, the defects of representation were as grievous as in England or Scotland. In arranging the terms of the union, Mr. Pitt took the opportunity of abolishing many of the smaller nomination boroughs, but many were retained, and places of more consideration were reduced, by restricted rights of election, to a similar dependence(*d*). The practice of multiplying freeholds for election purposes was carried to a most mischievous extent, as the freeholds were created without possession of property. Thus many of the counties in choosing

(*a*) Political Cyclopædia, vol. ii. p. 589; 1 May's Constitutional Hist. 297
(*b*) 2 & 3 Will. IV. c. 65, ss. 6, 7, 9.
(*c*) *Ibid.* ss. 13, 15, 22.
(*d*) 1 May's Const. Hist. 298.

their representatives were absolutely under the dictation of a few large proprietors(*a*).

The Catholic Emancipation Act of 1829 had raised the freehold qualification in counties from 40*s*. to £10 annually. The Irish Reform Act of 1832 retained this qualification, and added that of copyholds of the value of £10 annually, and certain classes of leaseholds.

In Irish cities and boroughs, the change wrought by the reform was greater even than in England. In several important towns the representatives had been returned by a dozen self-elected burgesses. The Irish Reform Act (preserving existing rights of 40s. freeholds in boroughs), raised that qualification, as to future possessors of it, to £10 annually(*b*).

By subsequent legislation the property qualification both for borough and county voters in Ireland has been greatly reduced. A measure was carried in 1850, by which the borough franchise was given to occupiers of tenements of the rated value of £8 a year; and in counties, occupiers of lands of the rated value of £12 a year, and owners of estates in fee simple, fee tail, or for life, of the value of £5 a year, are entitled to vote(*c*).

In the bills for reform of Parliament, already noticed, which have been brought into Parliament since 1832, various proposals have been made for alterations of the qualifications of voters. Lord John Russell's bill of 1852

(*a*) 1 May's Const. Hist. 298; 2 Political Cyclopædia, 590.

(*b*) 2 & 3 Will. IV. c. 88, ss. 1, 6.

(*c*) 13 & 14 Vict. c. 69. The same Act greatly simplified the method of registration in Ireland. The state of the representation under the law of 1832 and the law of 1850 has been contrasted as follows:—"The two monstrous evils of the former state of the law—the dependence of franchise upon tenure, and the vexatious process of registration, which made the attainment of the right of suffrage as troublesome as a lawsuit,—no longer disgrace the Irish representative system. The system established by the law of 1831 broke down under two fatal defects. The Irish constituencies were on the verge of extinction (the total number of Parliamentary electors for all Ireland amounting only to 72,000), when Sir William Somerville introduced what may be called the New Irish Reform Bill, establishing a franchise of the simplest nature." (Edinburgh Review, 1851.)

proposed to extend the borough franchise to occupiers of houses of £5 annual rated value, and the county franchise to tenants at will rated at £20, and copyholders and leaseholders rated at £5, and to create a new franchise arising out of the payment of 40*s.* in direct taxes to the state. Lord John Russell's Bill of 1854 proposed to reduce the qualification in boroughs to £6 rated value, and to introduce several new qualifications, including an income of £10 annually from dividends, the payment of 40*s.* annually in direct taxes, and a degree in any of the universities. The Bill of Lord Derby's administration, in 1859, proposed to render the qualifications in counties and towns identical, and to create several new classes of voters, including, besides some of those of the bill of 1854, lodgers paying £20 a year, ministers of religion, members of the legal and medical professions, and schoolmasters holding certificates of the Privy Council(*a*).

The personal disqualifications, which extend alike to voters in counties and towns, are defined by numerous statutes. Without entering into all the particulars of these disqualifications, it will be sufficient to state that women, minors, aliens, officers collecting and managing the excise and other branches of public revenue(*b*), persons of unsound mind, persons in receipt of parochial relief, and persons convicted of perjury or bribery, are universally incapable of voting; metropolitan police magistrates and police officers are incapacitated from voting in some counties adjoining the metropolis; agents and others employed by candidates for the purposes of elections are incapable of voting at those elections(*c*).

(*a*) May's 'Constitutional History,' ch. 6.

(*b*) The disqualification of revenue officers was enacted in 1782, at the instance of the ministry of Lord Rockingham, who stated that seventy elections chiefly depended on the votes of these officers, and 11,500 officers of customs and excise were electors. (1 May's Constitutional Hist., 289.)

(*c*) Rogers, ch. 3. A sessional resolution of the House of Commons declares that no peer (except Irish peers in certain cases) has a right to vote at elections. See further, as to interference of peers in elections, a subsequent page of this chapter.

3. *Elections of Members of Parliament.*—Under this head it will be convenient to consider successively the proceedings previous to elections, at elections, and subsequent to them.

We have already stated that all elections of members to serve in Parliament take place by virtue of writs issued out of the Crown-office in Chancery. Formerly all the writs were directed to the sheriffs, requiring them to cause knights to be elected for their respective counties, and citizens and burgesses for the cities and boroughs within their counties; and the sheriff, on the receipt of such writ, made out precepts to the returning officers of such cities and boroughs, directing them to cause the elections for those place to be made. By the enactment of 16 and 17 Vict. c. 58, a simpler practice has been introduced in English elections; the writs being sent direct to all English returning officers, and the practice of sending precepts by the sheriffs being discontinued. Also by 25 & 26 Vict. c. 92, s. 3, writs for boroughs in Ireland are to be sent to their returning officers, or, in their absence, or when their office is vacant, to the sheriffs of the counties in which the boroughs are situated.

In Scotland, the writs for counties as well as boroughs, are directed to the sheriffs, who are returning officers both for the shires and the boroughs within them. Writs for the Universities of Oxford and Cambridge are directed to their Vice-Chancellors.

If a vacancy occurs during the sitting of Parliament, upon motion in the House of Commons, the Speaker, by warrant under his hand, orders the clerk of the Crown to make out a new writ. In 1672 an attempt was made by Lord Shaftesbury, then Lord Chancellor, to arrogate to the Crown the privilege of issuing writs during a prorogation. This claim on the part of the Crown(*a*) was rendered the more objectionable, because Shaftesbury insisted that the elections upon such writs were returnable in Chancery, and

(*a*) See as to the ancient jurisdiction with respect to Parliamentary writs the fifth division of this chapter.

to be examined there. The House of Commons, however, avoided all the elections made on those writs, and declared that power of issuing writs to supply vacancies, and adjudicating upon the returns, was in that House(*a*).

The Speaker's warrant issues during a recess also, on a vacancy caused by the decease of a member, or a member becoming a peer, when there is a prorogation or adjournment of such length that a new writ may be issued before the next meeting of the House. This warrant issues upon certificate signed by two members of the House of Commons, stating the cause of the vacancy, and after fourteen days' notice in the Gazette of such certificate. Provision is also made for issue of new writs in certain cases where members become bankrupt, and where they accept any office by which their seats are vacated(*b*).

The manner of issuing writs for a general election has already been considered in a preceding chapter(*c*).

Formerly many disputes arose as to who were the proper returning officers, and double returns were frequently occasioned by two persons in the same place claiming each to be the proper officer to make the return. The title to exercise the office of returning officer is now however well ascertained. The returning officers of English counties are the sheriffs. The returning officers of boroughs are usually their chief municipal officers. The Reform Act designates the returning officers of various boroughs, and in others directs the sheriff to appoint returning officers. In counties, the sheriffs or their deputies preside at elections (*d*).

The first duty of the returning officer on the receipt of the writ, is to give due notice of the time and place of holding the election. The interval between the receipt of the writ and the election is a few days, of which the number differs for counties and boroughs(*e*).

(*a*) 2 Hatsell, 247; Burnet's Hist., A.D. 1672.
(*b*) Clerk, Law of Elections, ch. i.
(*c*) *Ante*, p. 40.
(*d*) 2 Will. IV. c. 45, ss. 11, 61. Bushell's Manual of Elections, ch. ii.
(*e*) Clerk, Law of Elections, ch. i.

On the nomination day, the returning officer, in the first place, reads the writ for the election; and then takes an oath respecting the impartial discharge of his duty; then calls on the electors to propose candidates. Each candidate is proposed and seconded. The candidates then address the electors; and if there be more candidates than vacancies to be supplied, the common practice is to call upon the electors present by a show of hands to declare whom they elect. If no more candidates be nominated than are necessary to fill the vacant seats, the returning officer must immediately declare those so nominated to be duly elected, without waiting for other candidates to come forward. But if the nominated candidates exceed in number the vacancies, and a poll be demanded on behalf of any candidate rejected on the show of hands, the returning officer is bound to grant the poll. Were he to refuse the poll and return any one of the candidates, the election would be void.

The polling-day is the next after the nomination day in boroughs, and usually the next day but two in counties. In all elections, a sufficient number of polling places are required to be appointed, so that not more than a limited number of voters may be polled at each polling-place.

At the time of polling, the only inquiry as to the right of a person to vote is, whether he is the person named by his name on the register of voters, and whether he has already voted at that election. He may be required to take an oath as to these particulars, but in England and Ireland no other oath can be required. In Scotland he may be further required to take an oath as to the continuance of his property qualification.

The vote is given *vivâ voce*, and entered in a polling-book by the polling-clerk; and after the vote is entered, it cannot be withdrawn or altered by the voter; but a mistake which is clearly that of the polling-clerk, may be at once corrected. The returning officer has not, however, any power of entering into a scrutiny of votes(*a*).

(*a*) Clerk, Law of Elections, 37.

The polling now lasts only one day in all elections, except in the Universities, and the county of Orkney and Shetland in Scotland.

The benefit of this limitation of the time of polling can be estimated only by reference to narratives of the disorder and corrupt practices which formerly prevailed at protracted elections. Formerly, the polling was sometimes continued thirty or forty days. This long continuance of elections was the occasion of lamentable excesses and disorder. To select one of numerous instances which might be cited, the election of Westminster in 1784, at which Mr. Fox was a candidate, was continued for forty days, and was disgraced by scenes of drunkenness and violence(*a*). Even if no other reform had been effected in modern times, the shortening of the periods of the saturnalia of elections was a great gain to public and political morality.

Upon the closing of the poll the poll-books are sealed, and kept under seal until the *declaration* of the poll, which in English counties is made by the sheriff the next day but one afterwards, and in English boroughs may be made immediately after the closing of the poll, or the next day.

The *return* is made by indenture, which names the persons chosen, is signed and sealed, and returned to the Crown office in Chancery, tacked to the writ itself. The returning officer has no discretion to inquire as to the disqualification of any candidate, or the invalidity of votes, but must return the candidates who have the majority of votes.

At the Westminster election of 1784, already noticed, the returning officer, by an abuse of his power, delayed the return after the day when the writ was returnable, and thus withheld from the successful candidate, Mr. Fox, the title to his seat for Westminster. At that time the returning officer had the power of granting a scrutiny of votes. The returning officer of Westminster entered on a scrutiny protracted during several months, when at length the House of Commons, in opposition to the minister, Mr. Pitt, or-

(*a*) 1 May's Constitutional History, 291.

dered an immediate return(*a*). To check such abuses for the future, it was enacted by the statute 25 George III. c. 84, that immediately or on the next day after the closing of a poll the declaration and return shall be made, unless a scrutiny be granted, in which case the return is to be made within a certain time limited by the Act. It has been stated that the returning officer has not now the power of granting a scrutiny.

With a view of securing freedom of elections, many resolutions of the House of Commons, have been passed against interference in the proceedings of elections by persons in power, including ministers of the Crown, and all peers (except Irish peers candidates for seats in the House of Commons) and lords lieutenant(*b*). Soldiers quartered near any place where an election is held, are prohibited by statute 10 Vict. c. 21, from leaving their quarters on the nomination and polling days, except for the purpose of relieving guard or voting.

4. *Bribery and corrupt practices at elections.*—We have already referred to some of the earlier efforts of the legislature to check bribery at elections,—an evil, the prevalence of which, from the time of Charles II. to the present time, is sufficiently apparent from the multitude of statutes passed for its repression. Of these, it is not intended here to give a particular account, as in the year 1854 an Act was passed consolidating the law as to bribery and corruption, and repealing all the statutes on the subject, from the Treating Act of William III. to the present reign. The Corrupt Practices Act, 1854, gives a new and extended definition of bribery, which includes gifts, loans, and offers of money, places, and other things of value, directly or indirectly, to

(*a*) Stanhope's Life of Pitt, ch. 7.

(*b*) Such unconstitutional interference may be inquired into by election committees, but is no ground for impeaching the validity of an election. (Clerk on Election Committees, p. 93.) Hatsell says (3 Precedents, 72) that interference of peers in elections of members of the House of Commons has always been deemed by that House a breach of its privileges; but the House of Lords have never admitted the force of this claim.

a voter, to induce him to vote or refrain from voting, or on account of his having voted or refrained from voting. The advance of money, with the intent that it shall be spent in bribery, is bribery, and so is repayment of sums spent in bribery (s. 2). Bribery is not only an offence in the corruptor, but also in the person receiving the bribe. Every voter directly or indirectly receiving or agreeing for a bribe is guilty of bribery; so is any person receiving a bribe on account of a voter (s. 3). Provision is also made to restrain *treating*, or the corrupt influence of an election by meat, drink, and entertainment, and the law on that subject is considerably extended (s. 4).

Bribery is a misdemeanor, punishable in different degrees in the briber and person bribed (ss. 2 and 3). Treating is a penal offence in a candidate, and invalidates the vote of an elector treated (s. 4).

The offence of *undue influence*, as defined by the statute, includes the use of force, or threatening any damage or loss, or practising any intimidation against a voter, and abduction or fradulent device to hinder him from voting. This offence is also a misdemeanor (s. 5).

A candidate found by an election committee guilty by himself or his agents of bribery, treating, or undue influence, at an election for any constituency, is incapable of sitting for that constituency during the Parliament then in existence (s. 36).

Another provision of this Act is for the appointment by the returning officers of *election auditors*. The candidate is restrained from paying any election expenses except through his authorized agents and the election auditors; and provision is made for the publication of accounts of all such expenses. It does not appear, however, that these provisions have been successful in restraining illegal expenses.

The Act of 1854 was a temporary Act, but has been renewed from time to time by Continuance Acts. In 1858, it was further provided(*a*) with respect to travelling of voters,

(*a*) 21 & 22 Vict. c. 87, s. 1.

that a candidate may provide conveyance for voters to the poll, but may not pay them money for the expense of such conveyance.

In addition to the general laws against corrupt practices at elections, Parliament has legislated specially in particular cases, where bribery has been found to prevail extensively, by the partial or total disfranchisement of the offending constituencies. Thus, since the reform of 1832, Sudbury and St. Albans have been wholly disfranchised, and a large class of voters was disfranchised at Yarmouth(*a*). In other cases, the House of Commons has suspended for long periods of time the issue of writs for new elections in places where corruption had been commonly practised.

Another effort of the legislature to repress the evils of electoral corruption is the Act of 1852, for inquiring into corrupt practices by means of Royal Commissions(*b*). Where a committee of the House of Commons has reported that corrupt practices have prevailed, or probably have prevailed, in any constituency, the Crown, on the address of both Houses, may appoint commissioners to make inquiry into such corrupt practices. The commissioners have large powers of compelling evidence, and indemnifying implicated persons; and the inquiry is not limited to the last election for such constituency, but where it is one of several successive corrupt elections for the same constituency, may be extended retrospectively to all of them. The commissioners report the result of their inquiries, and their report is laid before Parliament.

5. *Controverted Elections.*—The House of Commons has long been very jealous of its jurisdiction of the trial of controverted elections. At an early period of the history of the House of Commons, it appears that the Kings or their councils were the judges of undue elections(*c*). In a great

(*a*) 7 & 8 Vict. c. 53; 11 & 12 Vict. c. 24; 15 & 16 Vict. c. 9.

(*b*) 15 & 16 Vict. c. 57.

(*c*) Parry's 'Parliaments,' xxii., where it is said that this jurisdiction continued till 23 Edw. IV. (A.D. 1484), and many years afterwards.

Prynne, in his 'Plea for the Lords and House of Peers,' quarto, 1658,

dispute between the Commons and King James I., A.D. 1604, respecting their jurisdiction, the Commons asserted that, until 7 Hen. IV. (A.D. 1406), all Parliament writs were returnable into the Parliament, and that after the form of writ had been altered by statute of that date, the clerk of the Crown had always used to attend the Commons, with the writs and returns, and the Commons had appointed committees for examining controversies respecting elections. One of the reasons of the Commons for asserting their jurisdiction was, that if it were given to the Crown, a Chancellor might call a Parliament of what persons he would; and any suggestion of any person might be the cause of sending a new writ(*a*).

By many old statutes the justices of assizes had power to inquire into illegal returns by the sheriffs. By 11 Hen. IV. c. 1, if on such inquiry the return was found illegal, the sheriffs incurred a penalty of £100, and the knights of counties unduly returned lost their wages of the Parliament; it was further provided (6 Hen. VI. c. 4), that the knights of shires, and sheriffs, should be entitled to make their defence upon such inquiries; they were to be made where

p. 412, cites records, several of which are as late as 10 Hen. VI., from which he infers that the King and Lords were anciently sole judges of the legality of the elections, and that the jurisdiction claimed by the Commons was "a meer late groundless innovation, if not usurpation, upon the King, House of Peers, and Chancellors of England, noways grounded on the law and custom of Parliaments." See also the fourth part of Prynne's Parliamentary Writs, 2 to 1664, p. 261.

In 13 Eliz., A.D. 1571, a committee of the House of Commons inquired respecting the validity of returns from several chartered boroughs, which had returned members to that Parliament, but not to the last. The House allowed the returns, because the validity of the charters was to be examined in another place, if necessary. (Parry's 'Parliaments,' 217.)

In the House of Commons, under Cromwell, it was resolved, A.D. 1657, to give him the power of calling Parliaments, constituted in a defined manner, and that commissioners should be appointed by Act of Parliament to try the validity of elections. (Parry's 'Parliaments,' 520.)

The earlier authorities on the jurisdiction of controverted elections are collected and much commented on in the great case of Barnardistone *v.* Soame. (6 State Trials, 1063.)

(*a*) 2 State Trials, 100, 104.

the return was not according to the majority of duly qualified electors (8 Hen. VI. c. 7); every knight, citizen, and burgess, duly chosen, but not returned by the sheriff, might have an action of debt against the sheriff within three months after the Parliament commenced, or against the person unduly returned (23 Hen. VI. c. 14).

In the debate in the House of Commons on the great case of Ashby *v.* White, which has been already mentioned with reference to other constitutional questions, the ancient statutes just cited were referred to. It was said that there were only two recorded instances, and those very ancient, in which the King had exercised any jurisdiction as to undue elections; and in those instances the King had, upon the petitions of the Commons, appointed commissions to determine the elections: that the jurisdiction of the Commons had existed for 200 years, and was confirmed by the then recent statute 7 and 8 Will. III. c. 3(*a*). By that Act, any return contrary to the last determination of the House of Commons, as to the right of election in any county, etc., is declared to be a false return. By that Act also, any person duly elected may sue the officers and persons making or procuring a false return for damages at law(*b*).

After the practice of the House of Commons, of appointing committees to inquire into controverted elections, had

(*a*) 14 State Trials, 715. As to the manner in which the Commons asserted this right in 28 Elizabeth, when the Queen stated that the jurisdiction of controverted elections belonged to the Lord Chancellor; in 1 Jac. I., when the Lords were about to inquire into the proceedings of the Commons on a controverted election; and in 25 James I., when Lord Chancellor Shaftesbury had issued election writs during a recess, without the authority of the House of Commons,—see Conferences on the Case of Ashby *v.* White, 3 Hatsell, 315.

(*b*) In Prideaux *v.* Morrice, decided 12 Will. III. (7 Modern Reports, 13), it was held that an action would not lie at common law against a returning officer for falsely returning a candidate. The marginal note adds, "but an action lies on 7 & 8 Will. III. c. 7." The special verdict in that case found that the right had not been determined in the House of Commons, and the court refused to say what its decision would have been, if the matter had been determined by the House of Commons in the Plaintiff's favour.

been established, the rule for some time was to appoint special committees of members qualified to conduct the inquiry; and it was resolved, that no members should have any voice on those committees of privileges but the members denominated(*a*). But after a time this salutary rule was relaxed. Every member might attend the committee, and consequently its decisions, instead of being made accordng to the rules of law and evidence, became mere matters, of party contests. This partiality in judging elections prevailed in the House of Commons in the reigns of James II., William III., and Anne(*b*), and continued an unmitigated abuse until it was partly corrected by the celebrated Act introduced by Mr. Grenville in 1770, by which the committees in election cases were to be thirteen members, selected by the parties from a list of forty-nine members chosen by ballot. This measure, however, only in a limited degree removed the odium attached to the committees on elections, on account of their partiality, and was superseded by Sir Robert Peel's Act of 1839, by which the election committees were thenceforth to be nominated by the Speaker. The principle of that system has been maintained, but gradual improvements have been made down to the year 1848, when the Act(*c*) now in force for the constitution of election committees was passed.

Shortly after the commencement of each session, the Speaker nominates six members to be a *general committee of elections*. The members of it are sworn to perform their duties without fear or favour. All election petitions are referred to this committee, and where several petitions relate to the same election, they are dealt with together. The general committee select a sufficient number of chairmen of election committees, and make arrangements for distributing their duties. The rest of the members of the House liable

(*a*) Resolution of House of Commons, 21 James I.; Parry's 'Parliaments,' 292.

(*b*) Burnet, A.D. 1685, A.D. 1701, A.D. 1702, A.D. 1705, etc.

(*c*) 11 & 12 Vict. c. 98.

to serve on the committees are then divided into five panels, of nearly the same number in each. After fourteen days' notice with respect to each election committee, the general committee proceed to choose that committee. The chairmen's panel on the same day choose one of their own number to be chairman of that committee, and communicate to the general committee the name of the chairman so chosen, after the general committee have selected four members to form the rest of that election committee.

The parties to an election petition may then object to the constitution of the election committee, on the ground that any of its members are disqualified for any of the reasons mentioned in the Act, viz. because such member voted at the election, or is a party for whom the seat is claimed, or is related to a claimant of the seat in the first or second canonical degree of kindred or affinity. Provision is made for filling up the number of the committee if any such objection be allowed.

The election committee is sworn in the House to try the matter of the petitions referred to them according to the evidence. The committee are required to sit from day to day during their inquiry into the election.

The most common election petitions are those which complain of an undue election or return. The petitioners may be either persons having a right to vote at the election, or a person claiming the seat, or alleging himself to have been a candidate at the election(*a*). The petitions must in general be presented to the House within a limited time after the commencement of the session, or after any new return. The parties who may defend the election complained of are the member, or electors who may defend with him or without his consent(*b*).

Petitions may complain of an election on the ground of irregularities in the manner of holding it, as impediments in taking the poll, or that it was prematurely closed, and

(*a*) 11 & 12 Vict. c. 98, s. 2.
(*b*) Clerk, Law of Election Committees, ch. 1.

other irregularities which may have the effect of rendering the election void(*a*). But the more common grounds upon which a return is complained of, are intimidation, bribery, and treating. A candidate who, by himself or his agents, is guilty of bribery or treating, is disqualified to represent the county or borough in which the offence occurred until the next dissolution of Parliament(*b*).

The candidate is responsible not only for his own acts, but for those of his agents, and for those of sub-agents appointed by them, even without his knowledge. There can be no doubt that this rule often acts with great severity and injustice, and that candidates have frequently been deprived of their seats for acts of which they were wholly unconscious, committed by persons of whose existence they were ignorant(*c*).

When the petition alleges that the unsuccessful candidate at an election had the majority of legal votes, the manner of ascertaining this is by a *scrutiny* of the votes. Where a scrutiny is intended, each party delivers a list of the voters intended to be objected to, with the grounds of the objections. The inquiry into each vote is a separate case, and is opened, answered, and decided by itself. The disqualified voters are struck off the poll. The committee may inquire into all disqualifications, such as bribery, receipt of parochial alms, etc., subsequent to the registration of the voters; also any claim to vote which has been specially allowed or disallowed by the "express decision" of the revising barrister may be considered by the committee; but in other respects the register is conclusive as to the rights of voters(*d*).

The parties of the petition are usually represented before

(*a*) Clerk, Law of Election Committees, ch. 4.

(*b*) Clerk's Election Law, ch. 6 and 7.

(*c*) "Inferences rather than proofs of agency having been accepted, members have forfeited their seats for the acts of unauthorized agents, without any evidence of their own knowledge or consent. In the administration of this law, committees, so far from desiring to screen delinquents, have erred rather on the side of severity." (May's Constitutional Hist. 363.)

(*d*) 6 & 7 Vict. c. 18, s. 98.

the committee by counsel, and produce evidence, the reception of which is (or ought to be) regulated by the rules of law.

The committee finally decide what persons (if any) are duly elected; whether the election is void, and whether a new writ ought to issue. Their determination is final between the parties, and is reported to the House, and carried into execution by the House(*a*).

Though considerable improvement in the adjudication of election petitions has been effected by the procedure just described, the system is still very unsatisfactory. It is indeed difficult to see how any election tribunal constituted of members of the House of Commons *can* be satisfactory. "In the nomination of election committees, one party or the other has necessarily had a majority of one; and though these tribunals have since been more able and judicial, their constitution and proceedings have too often exposed them to imputations of political bias"(*b*). Add to this, that the members of the committee are usually unskilled in the rules of evidence and other rules of law on which their decisions ought to depend; that they often take the law as counsel state it to be, and that consequently their decisions are notoriously conflicting. The separation of questions of fact from questions of law, and the determination of the former by the unanimous voice of a jury, of the latter by the determination of learned judges, has been found by the experience of ages in the ordinary tribunals of this country to be an invaluable means of justice. But in election committees there is no such separation. The questions of fact are decided by a verdict which is most commonly returned by a majority of one; the questions of law, by men who have had no legal training.

6. *Qualification of Members of the House of Commons.*—The number of statutes which enact special disqualifications to sit in the House of Commons is so great(*c*), that

(*a*) 11 & 12 Vict. c. 98, s. 86. (*b*) May's Const. Hist., 306.

(*c*) The number is said to be at least 116. (May's Parliamentary Practice, 34 *n.*)

only a summary of the principal disqualifications will be here given.

The following are disqualified personally:—aliens, minors, women, persons of unsound mind, bankrupts, traitors, felons, and persons declared by vote of the House incapable.

The following are disqualified by offices and places:—clergymen, Roman Catholic clergy, judges of the superior courts of law and equity, except the Master of the Rolls, peers, except Irish peers not of the twenty-eight elected Lords of Parliament, governors of colonies, various persons connected with receipt and management of taxes, officers of excise and customs, clerks in the Treasury and other Government departments(*a*); also, persons appointed by the Crown to hold offices created since 1705 vacate their seats, as is hereafter mentioned.

Any person who undertakes any contract with a government department is disqualified; but this does not include subscribers to Government loans(*b*).

A member of Parliament cannot, without vacation of his seat, be eligible for any other place(*c*).

Revising barristers are temporarily disqualified; sheriffs, and other returning officers, may not represent the constituencies for which they make returns.

The legislation now in force by which *placemen* under the Crown are excluded from being members of Parliament commenced in the reign of William III.(*d*). In 1693, the House of Commons passed a bill that rendered all members incapable of holding places of trust and profit under the Crown; but the House of Lords rejected the bill, as Burnet

(*a*) Rogers on Elections, ch. 2.; 1 Blackstone, Comm., 200.

(*b*) May's Parliamentary Practice, 36.

(*c*) 2 Hatsell, Precedents, 73.

(*d*) A bill to prevent any Member of the House of Commons from taking any Public Office was proposed in that House and rejected in 27 Car. II. (Parry's 'Parliaments,' 570; 2 Hatsell, 66 *n.*) To the same effect was the celebrated "Self-denying Ordinance" passed by the House of Commons during the civil war in the reign of Charles I. (See Clarendon's Hist. of the Rebellion, vol. ii. book 8.)

says, since it seemed to establish an opposition between the Crown and the people, as if those who were employed by the one could not be trusted by the other(*a*). By several statutes of William III., persons holding various offices under the Crown in the customs and excise are disabled from sitting in the House of Commons. By a sweeping provision of 12 and 13 Will. III. c. 2, after the death of King William and Queen Anne, every person having a place of profit or pension from the Crown was to be disqualified; but this enactment was repealed before it took effect by 4 Anne, c. 8(*b*). Another general self-denying bill (as it was called) passed the House of Commons in 1705, incapacitating all persons holding places under the Crown created since 1684; this bill was lost by the House of Commons refusing amendments proposed in the Lords(*c*). But shortly afterwards an Act(*d*) was carried through Parliament, which creates various disqualifications.

In many cases the acceptance of places or pensions under the Crown disqualifies for sitting in Parliament *absolutely*. Such are all offices under the Crown created since 1705, and all pensions granted by the Crown during pleasure.

In case office under the Crown, which does not absolutely disqualify, is accepted by a sitting member, his election shall be void, and a writ shall issue for a new election, but he shall be re-eligible(*e*).

It has been decided with respect to this statute, that commissioners appointed by an Act of Parliament are not disqualified, as they are not appointed by the Crown; and that where an office has existed before 1705, though its name has been changed subsequently, the acceptance of it does not disqualify(*f*). In some modern Acts, creating new offices under the Crown, it has been specially

(*a*) Burnet, Hist., A.D. 1693.
(*b*) 2 Hatsell, 66 *n*.
(*c*) Burnet, 1705.
(*d*) 6 Anne, c. 7.
(*e*) See, as to the history of this expedient, 2 Hatsell, 66 *n*.; Burnet, A.D. 1705.
(*f*) 2 Hatsell, 59 *n*.

provided that the holders of them may sit in Parliament(*a*).

The result of the disqualifying legislation commenced at the Revolution, and continued through succeeding reigns, has been to reduce greatly the number of placemen in the House of Commons. In the 1 Geo. I., the number of members holding offices, pensions, and sinecures, was 271. In 1833, there were only sixty members holding civil offices and pensions, exclusive of naval and military commissions(*b*). On every change of ministry, a considerable number of seats in Parliament are vacated on the acceptance of new offices, and it cannot be questioned that the disposal of these gives the ministry a considerable power in the House of Commons(*c*).

Qualifications by possession of certain amounts of property were, until recently, required from English and Irish members; but all property qualifications of members of Parliament are now abolished, by 21 and 22 Vict. c. 26. The Commons, in 1696, first sent a bill to the Lords, limiting the election of members of Parliament to persons possessing a certain amount of property. The Lords rejected this bill: "They thought it reasonable," says Burnet, "to leave

(*a*) *E.g.*. 18 & 19 Vict. c. 10; 21 & 22 Vict. c. 106, s. 4, which enable additional Secretaries and Under-Secretaries of State to sit in the House of Commons.

(*b*) May's Constitutional Hist., 311.

(*c*) The following are not disqualified from sitting in Parliament:—Heirs apparent of all peers, ambassadors, attorney-general, and all assistants or attendants of the House of Lords, except judges, persons taken in execution in civil suits, officers of the Duchy of Cornwall, when that duchy is vested in the Prince of Wales. (2 Hatsell, Precedents, 18 *et seq.*) By the 28th section of the statute 6 Anne, c. 7, cited in the text, nothing therein contained is to extend to any member of the House of Commons being an officer in the army or navy, who shall receive any new or other commission in those services. But it has been decided that acceptance of a first commission in the army or navy vacates a seat. (2 Hatsell, 49, 52.) By 15 Geo. II. c. 22, many officers are excluded from the House of Commons; but by section 3, that Act is not to exclude (among others) the Secretaries of the Treasury and Admiralty, the Secretary to the Chancellor of the Exchequer, or Under-Secretaries of State, or any person having his office for life or during good behaviour.

the nation to their freedom in choosing their representatives in Parliament. It seemed both unjust and cruel, that if a poor man had so fair a reputation as to be chosen, notwithstanding his poverty, by those who were willing to pay him his wages, that he should be branded with his incapacity because of his small estate. Corruption in elections was to be apprehended from the rich rather than from the poor"(*a*).

7. *Vacation of Seats.*—The power of the House of Commons to order the issue of new writs on the vacation of seats in that House has been already considered. Where a member, after his election, becomes disqualified in either of the ways mentioned in the preceding division of this chapter, his seat is vacated. Another occasion of the vacation of seats is where members desire to relinquish their places in Parliament. This they cannot do directly, since it is an ancient rule of Parliament that a member once duly chosen cannot refuse to serve. But there are certain nominal offices under the Crown (the stewardship of the Chiltern Hundreds and some others), which, since 1750, have been granted to such members as wished to quit Parliament, to enable them to vacate their seats; the offices in question being considered to be among those, the acceptance of which is a statutory disqualification(*b*).

New writs have in some cases been issued where a person returned to Parliament refused to qualify himself by taking the prescribed oaths(*c*); other occasions, of course, are where a member dies, or becomes disqualified after he has taken his seat. Where, at a general election, a person has been elected for two places, he makes his election for which he will serve when the time for receiving election petitions has expired(*e*). New writs are also issued by order of the House, carrying into execution the determinations of election committees.

(*a*) Burnet, A.D., 1696. (*b*) 2 Hatsell, 55 *n*.

(*c*) This course was not, however, adopted in the cases of Baron Rothschild, 1850, and Mr. Salomons, 1851, on their refusal to be sworn "upon the faith of a Christian."

(*e*) 2 Hatsell, Prac., 74, 79.

The House of Commons has on several occasions expelled members, and ordered new writs to supply their places. Expulsion has taken place either for libels or other offences against the House itself, or upon legal conviction or other adequate proof of the commission of crimes, frauds, public malversation and corruption, for abuse of privilege of Parliament(*a*), or for fleeing to avoid criminal process. In the case of John Wilkes, expelled in 1764, it was ultimately decided, after a Parliamentary contest of many years, that a member expelled may, upon the issue of a new writ, be re-elected by his former constituents.

8. *Oaths taken by Members of Parliament.*—Formerly three oaths were required to be taken by members of Parliament. These oaths were—the oaths of allegiance, of supremacy, and abjuration, which respectively promised allegiance to the Crown, disavowed all jurisdiction or authority, ecclesiastical or spiritual, of the Pope and foreign powers, and abjured the Pretender(*b*). No member of the House of Lords could vote, or sit there, or make his proxy, nor could any member of the House of Commons vote there, or sit there in debate after the Speaker was chosen, without taking these oaths(*c*).

By an Act of 1858, one oath was substituted for the three oaths of allegiance, supremacy, and abjuration. The substituted oath promises allegiance to the Crown; to defend it against and to disclose conspiracies; to maintain the regal succession, which is limited by the Bill of Rights to the House of Hanover; renounces allegiance to all other claimants to the Crown, and disavows all jurisdiction and

(*a*) A.D. 1678. A member was expelled for granting protections to other than his menial servants. (Parry, 'Parliaments,' 582.)

(*b*) See, as to the ancient and modern oaths of allegience, Butler's Co. Litt., 68 *b*, note. In order to secure the succession of the Crown as settled at and since the Revolution, various statutes have been made, which rendered persons who refused to take the oath prescribed for abjuring the Pretender and his descendants liable to various penalties: 13 Will. III. c. 6; 1 Anne, stat. 1, c. 22; 1 Geo. I. stat. 2, c. 13; 6 Geo. III. c. 53.

(*c*) 1 Geo. I. c. 48.

authority, ecclesiastical or spiritual, of foreign powers within this realm; and concludes, "And I make this declaration upon the true faith of a Christian, so help me God." Quakers and others, now permitted by law to affirm instead of swearing, may make an affirmation instead of this oath.

The last-cited statute does not affect the provisions of the Roman Catholic Relief Act(*a*) with respect to the oath to be taken by Roman Catholics. This oath is nearly to the effect of the three oaths above-mentioned, except that it disavows the temporal jurisdiction only of the Pope in this realm, and contains a promise not to subvert "the present Church establishment," or disturb the Protestant religion or government in the United Kingdom.

By the Act for the Relief of Jews, members professing the Jewish religion may (if the House of Commons pass a resolution to that effect) take the necessary oath, omitting the words "and I make this declaration on the true faith of a Christian." By a subsequent Act, the House of Commons may, instead of a resolution, make a standing order to the like effect(*b*).

9. *Speaker of the House of Commons.*—It has been stated in a previous chapter that there is no evidence that the Lords and Commons ever voted together, though, before the regular constitution of Parliament in its present form, the Lords and Commons appear to have occasionally sat together in Westminster Hall; and when the Commons withdrew for separate deliberation, their answer was usually returned by one of their number. There are several recorded instances of persons thus chosen to speak for the Commons on particular occasions; but a regular Speaker, in the modern acceptation of the term, could not of course be appointed until the complete separation of the two Houses.

(*a*) 10 Geo. IV. c. 7. For an account of the laws prescribing oaths, and the manner in which they affected Roman Catholics formerly, see a long note to Butler's Co. Litt., 391 *a*. Formerly the Roman Catholics were disabled from sitting in Parliament by their refusing the oath of supremacy. They did not object to the oath of allegiance or the oath of abjuration. *Ib.*

(*b*) 21 & 22 Vict. c. 49; 23 & 24 Vict. c. 49.

For some time after the separation took place, a committee of the Lords was, at the request of the Commons, named to assist and advise with them, as in 50 Edw. III., A.D. 1376; again, in the following year, 51 Edw. III., A.D. 1377, when certain lords are appointed from time to time to confer with the Commons for "their better direction and information;" and again, in the year 1377 (1 Ric. II.) when the Commons pray the King that for the weakness of their abilities (*le feoblesce de lour pouairs et sens*) he will let certain prelates and lords be joined with them in consultation. In the two latter cases there were Speakers chosen by the Commons. Sir Thomas Hungerford, 51 Edw. III., spoke for the Commons in Parliament (*avoit les paroles pur les Communes d'Engleterre*), and Peter de la Mare, Knight of the Shire for Hereford, had speech for the Commonalty (*la parole de par la Communité*), in 1 Ric. II. These seem to be the earliest Speakers whose names are preserved(*a*).

At the commencement of every new Parliament for many centuries past, the House of Commons has, upon receiving a direction from the King, usually signified by the Lord Chancellor in the House of Lords, proceeded to elect a Speaker, and there are but three instances in which the

(*a*) Parry's 'Parliaments,' 134–8; 2 Hatsell, 212. The office of Speaker has been differently designated at different times. In 1 Ric. II. he is described as having "la parole de par la Communité;" in 17 Ric. II. he is styled "Commune Parlour;" 3 Hen. V., "Parlour;" 3 Hen. VI., "Prælocutor," and similarly in following Parliaments of that reign; 21 Hen. VIII., "Prolocutor." (Parry's 'Parliaments,' under the respective dates.)

Hakewel, in his catalogue of Speakers, appended to his 'Manner how Statutes are enacted in Parliament,' p. 200, begins with Petrus de Mountford, whom he makes Speaker in 44 Hen. III., citing the register of St. Albans, where it is said that Petrus de Mountford, *vice totius communitatis*, consented to the banishment of Adomar de Valence, Bishop of Winchester. But Prynne, in his preface to Sir R. Cotton's Abridgment of the Records in the Tower of London, says that this signing by Peter de Mountford "in the name of all the commonalty, was only as their proxie out of, not *Speaker* in Parl.," and that it is clear that the House of Commons had not a Speaker till many years after the Parliament of 6 Edw. III.

Speaker is known to have been chosen without such direction: viz. in the Convention Parliament which met at the Restoration in 1660, and the Convention at the Revolution of 1688, when Parliament met without the Royal authority; and in 1789, when the House of Commons chose a new Speaker during the mental imbecility of George III.(*a*).

It has long been the practice for the Speaker, after he is chosen by the House of Commons, to present himself to the King for his approbation. In 1592 Sir Edward Coke, in presenting himself, says, "This is only as yet a nomination, and no election, until your Majesty giveth allowance and approbation." In March, 1678, Sir Edward Seymour was presented as Speaker, and the King (Charles II.) refused to confirm the election. "Upon this," says Burnet, "great heats arose, with a long and violent debate. It was said that the House had the choice of Speaker in them, and that their presenting the Speaker was only a solemn showing him to the King. Seymour's election was let fall, but the point was settled that the right of electing was in the House, and that the confirmation was a thing of course. So another was chosen Speaker." Burnet's conclusion as to the point settled is not admitted by Hatsell, but the latter seems to overlook an obvious inference from the subsequent history of Seymour's Speakership, namely, that in April, Sir R. Sawyer, "chosen Speaker on the *illness* of Mr. Seymour," was accepted, and in May, "Edward Seymour, Esq. is restored to the chair on the *indisposition* of Sir R. Sawyer"(*b*). The instance of Seymour is not a solitary instance of the King's disapprobation of the choice of the House of Commons. In the next Parliament, 31 Charles II., A.D. 1679, the Commons chose Serjeant Gregory, whom the King rejected. After a prorogation of a few days, Gregory was chosen again by the Commons, and then accepted as Speaker "without hesitation"(*c*).

(*a*) 2 Hatsell, 220.

(*b*) Burnet, Hist., A.D. 1678; 2 Hatsell, 222; Parry, 'Parliaments,' 584.

(*c*) Parry's 'Parliaments,' 587. If Mr. Parry's account be correct, Mr.

The principal duties of the Speaker are, to pray the privileges of the House of Commons in his customary speech on presentation to the King at the commencement of a new Parliament; to keep order in the House; to put the questions on which it has to decide (except in committee); to appoint tellers upon a division; to inform the House upon the points of practice referred to him as they arise; where the numbers are equal, upon a division, to give a casting vote (*a*); to issue warrants for new writs to supply vacancies in Parliament, in manner already mentioned; to execute the order of the House that any person be thanked or reprimanded; to present money bills for the Royal assent (*b*); besides numerous duties connected with private bills, election committees, and officers of the House.

May, in his 'Treatise on Parliament,' ch. 7, and Sir F. Dwarris, in his 'Treatise on Statutes,' p. 96, are in error in their statement that Seymour's case was a solitary instance of the King refusing to approve of a Speaker chosen by the House of Commons. Hatsell also omits to mention the rejection of Gregory, mentioned in the text. He merely says, "In the next session" [next Parliament?] "Serjeant Gregory was chosen." (2 Precedents, 215.)

(*a*) The Speaker in the chair can give no other vote in the House of Commons; but in the House of Lords the Speaker may vote as any other lord, and on an equality of votes has no casting vote, the rule being *semper præsumitur pro negante.* (2 Hatsell, 245.)

(*b*) Whenever the King comes to the House of Lords and sends for the Commons, if a money bill has passed both Houses and been returned to the Commons, the Speaker takes it with him and offers it at the bar of the House of Lords for the Royal assent. In presenting money bills for the Royal assent, the Speaker, if the sovereign be present, makes a speech, either immediately arising out of the matter of the bill, or if it be at the end of the session, recapitulating the principal labours of the Commons during the session. (2 Hatsell, 248, 374; 3 Hatsell, 162–3.)

When bills were enacted by way of petition of the Commons and the answer from the King, the Commons usually presented petitions by their Speaker. The practice of presenting petitions by the Commons at the end of the session appears to have been common until the reign of Henry VIII. In that reign are several instances in which the King came to the House of Lords to pass bills ready for the Royal assent, and thereupon the Speaker made an "oration," and Parliament was dissolved. (Parry's 'Parliaments,' 203, 205.)

See, as to the Speaker's duties with reference to Supply bills, *infra*, book i. ch. 9.

His rank is next after the peers of the realm, and before all other peers and commoners (*a*).

By a standing order of July, 1855, in the unavoidable absence of the Speaker from the House, the Chairman of the Committee of Ways and Means may act as deputy Speaker until the next meeting of the House, and so on from day to day until the House shall otherwise order. If the House adjourns for more than twenty-four hours, the deputy Speaker shall continue to exercise the authority of Speaker for twenty-four hours only after such adjournment.

By a resolution of the House of Commons of 1604, "If any doubt arise upon a bill, the Speaker is to explain, but not to sway the House with argument or dispute." Hatsell comments on this rule thus:—"In matters of doubt, or if he be referred to to inform the House in a point of order or practice, it is the duty of the Speaker to state everything he knows on the subject from the journals or history of Parliament: but he ought not to argue or draw conclusions from this information. He has no voice but to utter the sense of the House when declared. The Speaker, however, when he gives a casting vote, usually declares the reasons which induce him to it; and in committees of the whole House he is considered as a private member, and has a voice accordingly. The rule as to the Speaker in the House of Lords is very different; for there he may give his opinion or argue on any question in the House" (*b*).

The important constitutional principle that the Speaker is subject to the authority of the House of Commons, and must not contravene it in deference to the Crown, is strictly regarded by the House of Commons. There are many instances in the proceedings of Parliament illustrative of this principle. Thus, in 18 Jac. I., A.D. 1621, the Speaker is admonished by several members for going out of the chair without the consent of the House, and for intricating or

(*a*) 2 Hatsell, 225 *et seq.*
(*b*) 2 Hatsell, 243; 1 Blackstone's Comm., 181.

deferring questions, and is told that he "is but a servant to the House, not a master or a master's mate." Again, in 4 Car. I., A.D. 1629, the Speaker, Sir John Finch, is similarly reprehended for refusing to put a question respecting tonnage and poundage, saying that "he is otherwise commanded by the King." And in the next Parliament, 16 Car. I., A.D. 1640, the Commons resolve that this refusal to put the question was a breach of privilege. On the celebrated occasion, 17 Car. I., A.D. 1642, of the King going to the House of Commons to arrest five of its members, and demanding of the Speaker (Lenthall) where they were, the Speaker replied, "I have neither eyes to see nor tongue to speak, in this place, but as the House is pleased to direct me, whose servant I am here; and I humbly beg your Majesty's pardon that I cannot give any other answer than this to what your Majesty is pleased to demand of me"(*a*).

(*a*) Parry's 'Parliaments,' under the respective dates.

CHAPTER IX.

PROCEDURE IN PARLIAMENT.

MANY of the rules of procedure in Parliament have been already discussed in the chapters relating to the Parliamentary powers of the Crown and the constitution of the two Houses. We shall here consider other rules of procedure in Parliament, confining our attention to those rules which appear to be of the greatest constitutional importance, and which relate to the two Houses in their legislative capacity, and reserving their procedure in matters of judicature for consideration in the second book of this work (*a*).

The law of Parliament is, according to an often-quoted passage of Coke, "ab omnibus quærenda, a multis ignorata, a paucis cognita" (*b*). The practice of Parliament is established partly by precedents, partly by standing and sessional orders, and partly by statutes and Royal prerogatives, several of which have been already referred to. Parliament has ever attached great weight to precedents as evidence of its privileges and rules of procedure, and where these have been disputed by either House or the Crown, the practice has constantly been to appoint committees to investigate precedents relating to the subjects in dispute.

(*a*) The present chapter is chiefly confined to so much of the subject of procedure in Parliament as appears to be of constitutional importance. For a more minute account of procedure in Parliament, the reader is referred to Mr. May's valuable treatise on the Law of Parliament.

(*b*) Co. Litt. 11 *b*.

The Standing Orders are rules and forms of procedure which have been adopted as they were found necessary from time to time, and which, unless rescinded, are of equal force in every Parliament, though occasionally they are "suspended," and some of them have become obsolete. Of the forms established by standing orders it has been observed, that by a strict adherence to them "the weaker party can alone be protected from those irregularities and abuses which these forms were intended to check, and which the wantonness of power is but too often apt to suggest to large and successful majorities"(*a*). The Sessional Orders are renewed every session, and are not of great constitutional importance. They differ from Standing Orders in being binding only during the session in which they are passed(*b*).

The rules of Parliamentary procedure are so multifarious that they do not admit of any very systematic classification. The following arrangement will however be sufficiently distinct for our present purpose; the subjects of this chapter will be divided into rules relating to:—1. Sittings, debates, and votes. 2. Documents and communications received by or from either House. 3. Committees. 4. Passing of bills. 5. Supply. 6. Summary jurisdiction.

1. SITTINGS, DEBATES, AND VOTES.—In the House of Lords the presence of three members is sufficient to enable the House to sit; but in the House of Commons the requisite number is forty. By a resolution of 1640, the Speaker is not to go into the chair till there be at least forty members in the House. If notice be taken after four o'clock in the afternoon that there are not forty members present, the Speaker, without question put, must adjourn the House to the next sitting day; but if the House meets before four o'clock he is to stay a reasonable time for a sufficient number of members to come in, but he is not to suffer business to proceed until forty members are present, after notice

(*a*) 2 Hatsell, 'Precedents,' 237.
(*b*) Bourke's 'Decisions,' 2nd ed. p. 326.

that there are not so many. In committees of the whole House, both before and after four o'clock, if it be found that fewer than forty members are present, the House forthwith resumes and adjourns. If on a division in the House or such committee it is found that fewer than forty are present, there is an immediate adjournment, and the matter under consideration is left in the state in which it was before the division (*a*).

By an Act of Parliament 6 Henry VIII. c. 16, which has long since ceased to be in force, every member who absents himself without license shall lose his wages. The occasion of this statute was that "divers being weary with sitting so long in Parliament, did depart home without license, they only remaining who factiously combined themselves with intention to gain the major part of voices in anything they desired to obtain" (*b*).

It has been the practice of the House of Commons, on several occasions of sufficient importance, to order that the House be called over at a future day, and that such members as shall not attend at the time appointed be taken into custody; though the latter part of the order is not commonly carried into effect.

All the decisions of either House of Parliament are taken upon *questions* brought before it, either upon original *motions* or upon *orders of the day;* the latter relate to business for which by orders of the House particular days are appointed.

By an ancient rule of the House of Commons any speech which is not relevant to a question before the House is out of order (*c*); but of this rule certain relaxations are allowed, one of which is where a member, by the indulgence of the House, is permitted to make personal explanations; another allows the practice of putting questions to ministers of the Crown respecting their conduct of public affairs, or to members of the House generally, respecting bills brought in by

(*a*) 2 Hatsell, 240 *n.*; Rules and Orders of the House of Commons, sec. 4.
(*b*) Parry's 'Parliaments,' 200. (*c*) Hatsell, 230 *et seq.*

them, and similar matters. It is also usual to relax the rules of debate on certain periodical questions of adjournment, and to permit very discursive discussions on those occasions.

The greater part however of the business of either House is disposed of either upon original Motions or upon the Orders of the day already referred to. In the House of Commons Motions are made upon notice, with some few exceptions, as motions for adjournment and unopposed motions. In order to facilitate the progress of bills, Orders of the day have, on certain days of the week, precedence of notices of motion, and on those days the House will not proceed with motions of which notice has been given, unless all the orders of the day for those days have been previously disposed of.

Another provision for the distribution of business in the House of Commons is of considerable constitutional importance, namely, that on certain days *Government orders of the day*—that is, orders to proceed with measures promoted by the ministers of the Crown—have precedence over other orders of the day. The portion of each session allotted to measures promoted by private members is thus limited, and towards the close of the session nearly the whole of the time of the House is occupied by Government orders of the day(*a*).

(*a*) See Standing Order of the House of Commons, June 25, 1852, amended August 5, 1853, and July 19, 1854.

By Resolutions of the House of Lords, 26th March, 1852, the House resolved to proceed with business in the order in which the notices stand in the minutes, unless where a notice is withdrawn, postponed, or lapses. On certain days, bills entered for consideration on the minutes of the day have precedence of all other notices.

Hakewel ('The Manner how Statutes are enacted,' sec. 2) speaking of the practice when he wrote (A.D. 1670), says, "Publique Bills are, in due course, to be preferred in reading and passing before private; and of publique, such as concern the service of God and good of the Church. Secondly, such as concern the Commonwealth, in which are included such as touch the person, revenue, or Houshold of the King, Queen, or Prince, and they ought specially to be preferred in passing. Lastly, private Bills should be offered to be read and passed in such order as they were preferred." He says, also, that at the end of a session a committee is sometimes appointed to marshal

The ancient practice of Parliament recognized no priority among its members with respect to their right of proposing bills. The existing rule, giving precedence to "Government Orders," is a very modern innovation, entirely subversive of the old constitutional doctrine of equality among members of Parliament.

It was the ancient practice for the Speaker to collect the sense of the House from the debate, and thence to form a question on which to take the opinion of the House; but this has been long discontinued, and at present the usual method is for a member who moves a question, to put it into writing and deliver it to the Speaker, who, when it has been seconded(*a*), proposes it to the House, and then the House are said to be in possession of the question.

It frequently happens that questions are moved upon which the House do not wish to give any opinion. In such case the House may adopt one or other of the following courses. It may pass a motion either to adjourn,—or (where the question moved is not an order of the day) for the orders of the day,—or for the "previous question,"—or for amendments of the question moved(*b*). The effect of such motions requires some consideration in this place, as they are important parts of the system of Parliamentary debate.

In the first of these cases the motion is simply that the House do now adjourn; and if the motion be carried, the adjournment is to the next sitting day. If the motion for the orders of the day be carried, these are proceeded with in the order in which they stand. A third method of superseding a question is by moving the "previous question." This previous question is, That this question (*i. e.* the pro-

bills in such order as they should think fit. He quotes, also, a passage from the ancient treatise *De Modo tenendi Parliamenti*, touching the order of preferring bills according to their subjects.

It is observable that the modern differs from the ancient practice regulating the priority of bills. The ancient practice had respect only to the subjects of the bills; the modern, to the persons presenting them.

(*a*) In the House of Lords, a question may be proposed without a seconder. (Dwarris, 229.)

(*b*) 2 Hatsell, 112.

posed question) be *now* put. If the previous question be negatived, the House thereby decides that the principal question to which it relates shall not be put from the chair at that time. If the previous question be carried, the principal question is accordingly put from the chair without further debate. In a debate 25 Charles II. (1673), it was said that "Sir Harry Vane was the first contriver of the previous question, and since it has been always the forerunner of putting the thing in question quite out." It was said in the same debate that "this previous question is like the image of the inventor—a perpetual disturbance"(*a*). Hatsell, however, says that there is an error in attributing the invention to Sir Harry Vane, and that it was used as early as 1604. It is a rule that in a Committee of the House there can be no previous question; if therefore it be wished to avoid a question, it is usual to move that the chairman do leave the chair(*b*).

When the question before the House is complicated, that is, consists of two or more propositions, the only modes of separating it are by moving amendments to it, or by moving that it be divided into two or more questions(*c*).

The following observations apply to amendments generally:—The simplest form of amendment of a motion is by inserting or adding words in it. Another method of amendment is by moving to omit part of the question, or to omit certain words and insert others. In either of the latter cases the question put from the chair is, that words proposed to be left out do stand part of the question. It is a rule with respect to amendments that after the latter part of a question has been amended, the former part is not to be recurred to and amended(*d*).

An amendment may be proposed to an amendment proposed to be made by inserting or leaving out words; but where the House has already resolved to insert or leave out certain words, a further amendment upon the *same* ques-

(*a*) Parry's 'Parliaments,' 566; 2 Hatsell, 111.
(*b*) 2 Hatsell, 116. (*c*) *Ibid.* 120. (*d*) *Ibid.* 123; Dwarris, 233.

tion inconsistent with that resolution will not be allowed. This principle however does not extend to successive stages of a bill; at every stage of it *every part* of it is open to amendment, and therefore words inserted at a former stage may be rejected, and words rejected at a former stage may be inserted(*a*).

After any question is proposed from the chair, any member may offer his reasons against it in whole or in part(*b*). The general rule is, that no member shall speak twice on the same question; subject to these exceptions,—that a member is often allowed to speak a second time to explain where he has been misunderstood,—that in a Committee of the House a member may speak as often as he pleases,—that if a new motion be made pending the former motion, as to adjourn or by way of amendment, every member may speak again. A reply is allowed to the mover of an original motion, but not to the mover of an amendment, nor to the mover of an order of the day, as that a bill be read a second time(*c*).

At the conclusion of the debate on any question, it is *put* from the chair, that is, the members present are required to declare by their voices, first who affirm, and then who negative it(*d*). When it is doubtful whether the Ayes or Noes prevail, it is common for the Speaker to put the question a second time(*e*), and thereupon he declares his opinion. When the Speaker has declared for the yeas or noes "upon the cry," any member in the presumed minority may require a division(*f*).

Upon a division tellers are appointed, and according to

(*a*) 2 Hatsell, 193, 207, 135 *n*.

(*b*) It is a very old rule that speeches are not to be read. In 1674, a member, reading his speech, is called to order, but, after debate, is allowed to proceed, but is not to be admitted to do so in future. (Parry's 'Parliaments,' 568.)

(*c*) 2 Hatsell, 105; Dwarris, 241.

(*d*) After both affirmative and negative voices have been given, there can be no further debate; but after the affirmative and before the negative, a member has a right to renew the debate. (2 Hatsell, 103 *n*.)

(*e*) 2 Hatsell, 187. (*f*) *Ibid.* 200 *n*.

the modern practice, all members voting go forth into two lobbies. Two clerks stationed at each of the entrances hold lists of the members in their hands, and mark the names of the members in each lobby. The tellers count the numbers and report them(*a*). In the House of Commons (as has already been stated), the Speaker has a casting vote in a case of equality of votes; and when the division is of a committee of the whole House, the chairman of the committee has similarly a casting vote.

In the House of Lords, every peer, by license from the Crown(*b*), may make another Lord of Parliament his proxy to vote for him in his absence: a privilege which a member of the other House cannot have, as he himself is but a proxy for a multitude of other people. Proxies are not allowed in any judicial cause(*c*).

(*a*) Rules and Orders of H. of Com., sec. 9.

(*b*) Any Lord of Parliament, by license of the King, upon just cause, to be absent, may make a proxy. (4 Coke, Inst. p. 44.) The proxies are entered *ex licentiâ Regis*, and the license of the Crown is presumed. (Elsynge, 'Method of holding of Parliaments,' ch. 5.) A doubt was started in 1788, when the King (George III.) was incapacitated by illness from granting leave, whether the proxies were valid. (Dwarris on Statutes, 169.)

(*c*) Standing Orders of the House of Lords, 29; Macqueen, 'Appellate Jurisdiction,' 26. The privilege of the Lords to appear by proxy is very ancient. Thus, in 34 Edw. I., A.D. 1306, they are summoned to appear personally or by sufficient attorneys. (Parry's 'Parliaments,' 67.) In 9 Edw. II., A.D. 1316, the Chancellor is to receive proxies, and scrutinize the excuses of those who do not attend. (*Ibid.* 80.)

After the establishment of the representative system in Parliament, spiritual lords were sometimes authorized by the writs of summons to make proxies, and at other times they were strictly prohibited; abbots and other spiritual persons summoned were frequently exempted from personal attendance by Acts of Exemption, which bound them to agree to the proceedings of the proxies of the clergy. (Parry's 'Parliaments,' xvii.)

In 18 James I., A.D. 1621, Lord Chancellor Bacon moves, that such as have any proxy from a lord licensed by his Majesty to be absent, shall deliver the same to the Clerk of the House; and every lord shall cause his writ of summons to be given to the Clerk, so that it may appear who is absent. (*Ibid.* 270.) Similar motions were made in preceding reigns, as in 39 Eliz. (*ibid.* 234); 12 James I. (*ibid.* 263). It is resolved in the House of Lords, 2 Charles I., that if a peer, having leave of the House to be absent, give his proxy, and afterwards sits again, the proxy is determined, and he cannot make a new proxy without new leave. (Parry, 309.)

Every peer has a right when a vote passes contrary to his sentiments to enter his dissent in the journals of the House, with the reasons for such dissent, which is usually styled his *protest*(*a*).

The earliest instance on record of a protest *with reasons* is in September 9, 1641; but the practice of simple protests without reasons is more ancient(*b*). Lord Clarendon says in speaking of this practice, "It was an old custom and privilege of that House, that upon any solemn debate, whoever is not satisfied with the conclusion and judgment of the House, may demand leave to enter his protestation, which must be granted." He adds, that in 1641, the custom arose of the minority entering their protestations in trivial cases, and "they altered the form, and instead of short general entries, caused the matter of debate to be summed up"(*c*). The practice of entering protests with or without reasons is recognized in a standing order of the House of Lords, March 5, 1641, in which it is said that such protests may be entered without leave of the House(*d*). In the latter part of the same year, an attempt was made in the House of Commons to introduce the practice of entering protests there, but it was disallowed(*e*). Roger North states(*f*), that in the proceedings in the House of Lords on Fitzharris's impeachment in 1681, objections were raised to the entry of protests with reasons, because only the reasons upon one side—and that the minority—appeared upon the record; but the House allowed the protests with reasons to be entered. North says, that "was the beginning of protesting with reasons in our day." This however is an error, as appears from the foregoing dates.

By an order of the House of Lords of 1721, protests to any votes of the House are to be entered on the following day. This order also recognizes the right to protest with

(*a*) 1 Blackstone, Comm., 168. (*b*) 11 State Trials, 307.
(*c*) 'History of the Rebellion,' vol. ii. book 4.
(*d*) 12 State Trials, 1189. (*e*) Parry's 'Parliaments,' 368.
(*f*) Roger North, 'Examen,' part i. ch. 2, s. clii.

or without reasons. The House of Lords has on some occasions exercised the power of expunging protests from its journals(*a*).

We have next to consider the manner in which the proceedings of the two Houses are recorded. In the House of Lords the duties of a registrar devolve upon the Clerk of the Parliaments, the antiquity of whose office is evidenced by its title, which shows that the office must have been created at a period when the entire Parliament formed but one assembly. The duties of taking minutes, and making proper entries of all the proceedings of the House of Lords, are performed by deputy clerks officiating at the table of the House(*b*).

In the House of Commons similar duties devolve upon the clerk of that House, who is styled in his patent "Under Clerk of the Parliaments to attend the Commons," and who, as Hatsell conjectures, went with the Commons, when the two Houses separated, and first sat in different places(*c*). His duties are to take notes of the orders and proceedings of the House of Commons. These, he and the clerk assistant both do in their minute books at the table; and from these minutes, the "Votes" which are ordered to be printed are made up under the direction of the Speaker. At the end of the session, the "Journal" is properly made out from the minute-books, the printed votes, and the original papers that have been laid before the House(*d*).

The most ancient records of Parliament are the Rolls of Parliament, which form by far the most important part of the public records of the kingdom, and which originally included—besides statutes, petitions, and writs—other miscellaneous information; which however began to be less copious when the Journals of the two Houses were commenced. The existing Rolls of Parliament commence in

(*a*) Protests objecting to the alliances formed by Queen Anne, in 1712, were, by the influence of ministers, expunged. (Burnet, Hist. of his own Time, A.D. 1712.)

(*b*) Macqueen, 'Appellate Jurisdiction,' 63-5.

(*c*) 2 Hatsell, 255, 267, 282.

(*d*) Rules and Orders of the H. of Com., 73, 74.

the reign of Edward I., and are continued, though with several chasms, through the subsequent reigns. The journals of the House of Lords commence with the reign of Henry VIII.; those of the House of Commons with the reign of Edward VI. The former have at all times been considered as records, and copies of them have consequently been admitted in evidence. The journals of the House of Commons, until the reign of Elizabeth, contain merely short notes of the readings of bills, and occasionally of other proceedings, but from the commencement of the reign of James I. are more copious. It was formerly doubted whether these journals were to be admitted in evidence as records, the claim of the House of Commons to be a Court of Record being disputed: it is now however settled, that copies of these journals are admissible as primary evidence(*a*).

The privilege of the House of Commons to publish in its reports, votes, and proceedings, matter which elsewhere would be libellous, might properly be considered here; but as that privilege is connected with the summary jurisdiction of the House, the consideration of it, to avoid repetition, is reserved to the latter part of this chapter.

The Houses of Parliament, until the latter part of the last century, discountenanced the unauthorized publication of their proceedings. Many early instances are to be found of opposition to such publication. Thus in 1641, the Commons in the Long Parliament resolved that no member should give a copy, or publish anything that he should speak in the House without its leave(*b*). Several orders of that House were also passed in that and the following

(*a*) Hubback on Succession, part iii. ch. 8; 2 Hatsell's 'Precedents,' 2, 70. Copies of the Journals purporting to be printed by the printers of either House are admissible in evidence, without any proof. (8 & 9 Vict. c. 113, s. 3.)

The practice of printing the votes has long prevailed. In 1702, the House of Commons discontinued printing their votes, in consequence of the House of Lords having taken notice of a printed vote; but shortly afterwards the practice of printing the votes of the House of Commons was resumed. (3 Hatsell, 34.)

(*b*) Parry's 'Parliaments,' 360; 1 Hatsell, 203.

year, inhibiting "the printing anything concerning the proceedings of the House," to prevent "inordinate printing," and for punishing printers of their proceedings(*a*). The House of Lords also at the same period punished printers of Parliamentary proceedings(*b*). The subsequent records of the Long Parliament contain frequent accounts of proceedings to restrain the general liberty of the press. A similar course of proceeding was adopted by Parliament under Cromwell. Thus, Sept. 22, 1654, the Commons resolve to appoint a committee "to consider the abuses in printing, and to stop the printing of Diurnals and New Books." Even the taking of notes in the House by a member was objected to as contrary to its rules(*c*).

After the Restoration the publication of speeches in Parliament continued to be opposed by the Houses. In 1679 two members, having printed their speeches, were complained of in the House of Commons, which thereupon directed inquiries(*d*). After the Revolution of 1688, Parliament was more strict than ever to restrain news-writers from giving accounts of debates. An Act of Charles II.(*e*) had been directed against "the frequent abuses in printing seditious, treasonable, and unlicensed books and pamphlets, and for regulating printing and printing-houses." This Act was kept in force by Continuance Acts until 1694, when, notwithstanding the attempts of the King's ministers to revive it, it expired(*f*). The liberty of unlicensed printing dates from that period, but the Houses of Parliament, by exercise of their power of punishing breach of privilege, continued to restrain, or endeavour to restrain, the publication of debates. In order to evade the prohibition of publishing debates, the public journals of the last century, in their reports, omitted the names of the speakers, or disguised their names, or resorted to similar expedients. But

(*a*) August 24, November 24, 1641; March 28, 1642.
(*b*) Lords' Order, December 16, 1641.
(*c*) Parry's 'Parliaments,' 513, 519 *n*.
(*d*) 1 Hatsell, 203 *n*. (*e*) 13 & 14 Car. II. c. 33.
(*f*) 1 Blackstone, 'Commentaries,' 153 *n*.

in 1771 several of the journals determined to discontinue those devices, and to publish the debates with the real names of the speakers. Thence arose a contest between the House of Commons and the press, supported by a strong popular party, which ended in virtually establishing the practice of publicly reporting debates. This may be fairly said in extenuation of the conduct of the House of Commons at that time, that the practice was common of publishing debates with gross partiality and much scurrilous comment. In 1771 several printers were reprimanded by that House, on account of speeches printed by them. Other printers refused to obey the orders of the House for their attendance. A messenger of the House was, for arresting one of them in virtue of the Speaker's warrant, charged with an assault, and was committed by three magistrates of the city of London, including the celebrated John Wilkes. The two other magistrates were committed to the Tower by the House, but released, upon the prorogation of Parliament, shortly afterwards. Their liberation was celebrated as a triumph by the people, and from that time Parliament has refrained from interference with the regular publication of its debates(*a*). For many years past separate galleries in the House of Parliament have been appropriated to the use of the reporters for the newspapers. The Houses have not expressly abrogated their rules against the publication of debates, but in modern times have refrained to enforce them, except in cases where the proceedings of Parliament have been wilfully misrepresented.

2. PARLIAMENTARY DOCUMENTS AND COMMUNICATIONS. —The most important of these, with reference to constitutional rights, are *petitions*. It is not, however, intended here to consider the general right of petitioning and its constitutional effect, which are reserved to another chapter, but only some particulars of procedure in Parliament respecting public petitions. Of private petitions, those which

(*a*) Crosby's Case, 19 State Trials, 1138.

relate to private bills will be referred to under the head of private bills, and those which relate to appeals to the House of Lords, under the head of judicature.

All petitions to either House of Parliament must be presented by a member of the House to which it is presented, with this exception, that the corporations of London and Dublin have the privilege of presenting their petitions by their own officers. Formerly the practice in both Houses was to permit debates upon the presentation of petitions; but the great increase of the number of petitions in modern times and of the time occupied in their discussion, has led to the adoption of rules by the House of Commons by which the general right of debating petitions in that House is taken away. The rules of the House with respect to the presentation of public petitions are now as follows:—Every member offering to present a public petition is to confine himself to a statement of the parties from whom it comes, of the number of signatures attached to it, and of the material allegations, and to the reading of the prayer. The petition is to be read by the clerk at the table if required, but no debate is to be allowed upon it except where it complains of some present personal grievance requiring immediate remedy. Public petitions, after they have been ordered to lie on the table, are referred to the Committee on Public Petitions. A petition which relates to the subject of some notice of motion, may by order be printed with the votes. The more important of the petitions thus referred to the Committee on Public Petitions are occasionally printed, and of the remainder of the petitions abstracts and notices are printed in reports of the committee, which appear at frequent intervals during the sessions of Parliament(*a*).

(*a*) Standing Order, April 14, 1852; Rules and Orders, sect. 18; Bourke's 'Decisions,' p. 283. The following particulars may be added:—Petitions must be written, not printed; there must be some signatures on the same sheet or skin as the petition itself; it must be couched in proper language, and contain nothing intentionally disrespectful; a petition signed by the chairman of a meeting on behalf of himself and others, can be received only as the petition of the individual signing.

Among communications received by or from either House of Parliament are *messages* from the Crown to the Houses of Parliament, and *addresses* from Parliament to the Crown. The nature of some of the communications from the Crown to Parliament has been stated in the sixth chapter.

Of *addresses* to the Crown, some are original and some in reply to communications from the Crown. Of the former the following are instances:—Addresses of condolence; with respect to carrying on a war; for the formation of a new ministry(*a*); to pass a bill which awaits the Royal assent(*b*); for papers to be presented to Parliament; to institute prosecutions by the Attorney-General; to issue public money the grant of which has not been previously recommended by the Crown. The three latter kinds of addresses will be further considered hereafter. Besides these there are certain addresses to the Crown which have a statutory effect, as joint addresses of the two Houses for the removal of judges, and joint addresses for commissions of inquiry into corrupt practices at elections.

Addresses in reply to communications from the Crown include the addresses in reply to the Royal speeches at the commencement of sessions. After a bill has been read *pro formâ*, the Royal speech is reported and read to the House by the Speaker(*c*). An address in answer to the speech is then moved and seconded, and a select committee is appointed to draw up the address(*d*). This, unless amendments to it are carried, is a substantial repetition of the Royal speech, with merely verbal variations.

A joint address of both Houses is presented either by both together in a body, the Speaker accompanying the Lord Chancellor, or in some cases by committees of each

(*a*) 2 Hatsell, 389.

(*b*) *Ibid.* 341. The House of Commons has repeatedly exercised the right of addressing the Crown on the subjects of war or peace, and other matters of Royal prerogative, though such subjects have not been submitted to the consideration of Parliament by the Crown. (See 2 Hatsell, 308, note.)

(*c*) Rules and Orders of H. of Com. sec. 2.

(*d*) 2 Hatsell, 387-8.

House together. An address of the House of Commons alone is presented either by the whole House or such members as are Privy Councillors. An address is usually prepared by a committee, pursuant to a resolution; but frequently resolutions for an address have been presented by the whole House, without drawing them up in form(*a*).

Messages from the Crown are not always acknowledged in the House of Commons by addresses; a message for a supply is usually referred to a committee of supply(*b*). But where the King, in deference to the privileges of either House, has informed it of the arrest of one of its members, the House has usually by address returned thanks for the regard shown to its privileges.

The next class of Parliamentary communications to which we shall refer are those which take place between the two Houses. These are made either by *messages*,—or *committees*,—or *conferences*.

Messages are not sent from one House to the other, except when both are actually sitting. The ancient form of sending a message from the Commons to the Lords was by a member, usually selected by the Speaker and attended by other members(*c*). The Lords sent messages in matters of importance by some of the judges, and ordinary messages by masters in Chancery; but since the abolition of the office of masters in Chancery, it has been necessary to make further provision for carrying messages between the two Houses, and now, by a resolution of both Houses(*d*), in addition to the previous practice, messages may be sent and received by the clerks of either House while it is sitting or in committee, without interrupting the business then proceeding. The most common occasions of messages between the Houses are the sending of bills and demands for conferences(*e*); and by a modern rule(*f*), reasons of either House for insisting upon or disagreeing to amendments to

(*a*) 2 Hatsell, 388.
(*b*) *Ibid.* 361–4.
(*c*) 3 Hatsell, 27.
(*d*) Rules and Orders of H. of Com. sec. 14.
(*e*) 3 Hatsell, 22 *et seq.*
(*f*) Rules and Orders of H. of Com. No. 283.

bills as to which the Houses disagree, may be communicated by messages as well as by conferences.

Joint committees of both Houses are now disused. On these committees the number of members appointed by the Commons was twice that of the members appointed by the Lords. This rule, and the consequent inferiority of the power of the Lords in divisions of such committees, have probably led to the refusal of the upper House to join in them. A joint committee, to make inquiries and examine witnesses, as a preliminary to proceedings in Parliament, had this advantage, that only one inquiry was necessary for both Houses, and the proceedings of both thereon were necessarily grounded on the same information. In 1788, when it was intended to appoint a Regent, in consequence of the mental derangement of George III., it was proposed in the House of Commons to inquire into the state of the King's health by a joint committee; but the proposal was abandoned, in consequence of the anticipated objection of the House of Lords. A method of communication between the two Houses, having most of the advantages of a joint committee, is that adopted upon the inquiry respecting political societies in 1794, and again upon the inquiry into the state of Ireland, in 1801; viz. the appointment by each House of a select committee, with power given to each committee to confer with the other(*a*).

Conferences most usually take place where either House disagrees to amendments in bills made by the other, and are used for the purpose of communicating the reasons of either House for insisting upon or disagreeing to the amendments. If one House do not approve of the amendments of the other, it must either suffer the bill to drop, or endeavour to adjust the differences by a conference.

A conference will not be granted unless the reason for demanding it be stated, with sufficient precision to enable the House receiving the demand to see whether it be consistent with its privileges to confer on the matter submitted. Con-

(*a*) 3 Hatsell, 38 *et seq.*; Dwarris, 277.

ferences have frequently been refused, on the ground that no reason, or an improper reason, for the conference is assigned; thus the House of Lords has refused to confer upon a question of its exclusive jurisdiction(*a*).

The number of members of the Commons named *managers* of a conference is double that of the Lords. The conference being agreed to, the managers are appointed by each House; the managers are named by the proposers of the conference, and if it be insisted upon, each manager must be moved for separately(*b*).

Instructions are then given to the managers. If it be not a "free" conference, the course is for a committee of the House desiring the conference to draw up reasons to be offered thereat. These reasons being agreed upon by the House, are instructions to its managers, who cannot offer anything else at the conference: the managers for the other House have no other power at the conference but to receive such reasons for the purpose of repeating them to their House(*c*).

We have next to consider which House demands the first and subsequent conferences upon a bill. The first conferences upon a bill must be demanded by that House in whose possession the bill is, and is usually demanded in order to state reasons for disagreeing to amendments with which the bill has been returned from the other House (though, as we have seen, such reasons may now be communicated by message instead of conference). It is irregular to demand a conference for the purpose of requiring the reasons of the other

(*a*) 4 Hatsell, 23. (*b*) *Ibid.* 22 *n.*

(*c*) The practice of confining the managers to their written instructions at a first conference seems to have sprung up in the reign of James I. The Lords objected, 8 James I., A.D. 1610, to this course, on the ground that it prevented freedom of debate, and followed their objection by a message referring to "the difference between a free conference and a dry meeting." (Parry's 'Parliaments,' 259.) The practice referred to in the text was clearly recognized by both Houses soon afterwards. (See Parry, 275.) A conference, not free, formerly had the more apt name of a "meeting;" thus, 2 Charles I., the Lords "accept not a conference, but a meeting." (Parry, 309.)

House. It is also irregular for either House to send a message that it disagrees to the amendments of the other House, without at the same time requiring a conference; and in such cases of irregularity the bill has been redelivered (*a*).

If after receiving reasons at a first conference, the House receiving them still resolve to insist on its amendments or part of them, the course is for that House to demand a second conference, in order to communicate its reasons for insisting. If after a second conference the other House continue to disagree to the amendments insisted upon, the bill must be dropped, or that House must demand a "free" conference.

A free conference differs from others in this essential particular, that the managers at it are not bound to confine themselves to written instructions, but are at liberty to offer such arguments as they think proper, and to enter into a debate of the subjects of difference between the two Houses. The managers may have distributed among them several heads upon which they are severally to insist. After a free conference, no other than a free conference on the same subjects can be had, and occasionally several free conferences have been held successively.

At a conference the Commons' managers stand uncovered; but the Lords sit covered except when delivering their reasons (*b*).

Conferences are not exclusively upon amendments to bills, but have been held on many other occasions. Among these are conferences respecting invasion of the privileges of either House by members of the other, respecting joint addresses to the Crown, respecting Acts of the sovereign or ministers; and there are many instances in the reign of Elizabeth, and subsequently, of conferences respecting the amount of supplies to be granted to the Crown (*c*).

The last class of communications to Parliament here to be

(*a*) 4 Hatsell, 9 *n.*, 48, *et seq.*; Rules and Orders of H. of Com. sec. 15.
(*b*) 4 Hatsell, 9 *n*, 48 *et seq.*
(*c*) See Parry's 'Parliaments,' *passim*; 4 Hatsell's 'Precedents,' 1–14.

considered, are *accounts, papers,* and *documents,* laid before either House. These are either *Returns* to the Orders of either House,—or Documents presented by Royal command, —or in compliance with Acts of Parliament,—or Reports of Parliamentary Committees. The documents in question or abstracts of them are generally printed, and are very voluminous in each session. They include an immense collection of statistics respecting the revenue and expenditure of the country, commerce, navigation, salaries, trades, manufactures, population, army and navy, and administration of justice. The reports of select committees relate to questions of public instruction, political economy, colonial and international relations, public health, public works, and other subjects of legislation.

Some accounts and papers are laid before the Houses periodically, in pursuance of various Acts of Parliament; and some are presented by Royal command. Many accounts and papers are obtained from public departments as *returns* to orders of either House; but where the Royal prerogative is concerned, the House does not directly order the information required, but an address is presented praying that the same may be laid before the House(*a*). Thus, where information is required from a prerogative department of the Government, as the offices of the Secretaries of State, the information is usually obtained by address to the Crown, and papers in compliance with such address are presented to Parliament by Royal command. The ministers may refuse to supply information moved for where it relates to the exercise of the Royal prerogatives, and the communication of it is deemed inconvenient for the public service. In other cases motions in Parliament for returns and papers are not usually opposed unless where the collection of the information required would cause useless expense, or sufficient information already exists, or the information sought for is not of a public nature.

Among documents presented by command, are the re-

(*a*) Rules and Orders of H. of Com. sec. 20.

ports of Royal Commissioners, appointed to inquire respecting matters upon which it is important that Parliament should receive authentic information. It will be convenient to mention here some particulars respecting this valuable part of the English legislative system, though the subject is only incidentally connected with procedure in Parliament.

Inquiries by Royal commissioners are instituted solely by exercise of the Royal prerogative, or may be regulated by statute(*a*). The sovereign, by a commission issued under the sign manual, or by patent under the Great Seal, authorizes certain persons named in the commission to inquire respecting the subject specified, and report thereon to the Crown. The commissioners so appointed are usually persons eminent for knowledge of the subject on which they are to inquire, and in most cases perform their services gratuitously. Commissions of inquiry are issued by the Crown, sometimes in accordance with Acts of Parliament directing particular inquiries; sometimes in compliance with addresses from the Houses of Parliament; and sometimes by the sole authority of the Crown.

The commissioners usually proceed to take all evidence, and receive written communications from competent persons, and in some cases of scientific inquiries institute experiments. The balance of authorities seems to be in favour of the conclusion that those commissions, unless aided by

(*a*) Royal commissions of inquiry are very ancient. Thus the statute 6 Hen. IV. c. 3 (A.D. 1404), in consequence of frauds upon the King's revenue, enacts that commissions shall be directed to lawful and discreet persons to inquire and certify the profits received in the King's name and misappropriated. See also 4 Hen. IV. c. 9. By 2 Hen. V. stat. 1, c. 1, the ordinaries were to be appointed by the King's commissions to inquire into the governance and estate of Hospitals of Royal foundation, and to certify their inquisitions in the King's Chancery.

By the statute 10 Ric. II., A.D. 1386, passed after the degradation of the King's ministers, a commission was authorized to be appointed by the King, with extraordinary powers of inquiry into the state of the King's courts, and of the realm, and of reforming public abuses. (See as to the occasion on which this statute was passed, chapter 10, *infra*.)

Act of Parliament, do not confer compulsory powers to procure evidence(*a*).

3. COMMITTEES of either House of Parliament are either committees of the whole House or select committees.

Committees of the whole House were formerly called Grand Committees. The following account of their offices and procedure by an old writer is still correct with respect to the House of Commons:—

"A Grand Committee consists of as many members, at least, as constitute the House (less may not sit or act as a Committee), who have general Powers to consider of any Matters touching the subject Matter referred, and to present their opinions therein to the House, the better to prepare Matters of that nature, or Bills therein, for the House; which may better be prepared by the liberty that every Member hath in a Grand Committee, as well as in other Committees, to speak more than once to the same Business (if there be cause), which is not permitted in the House. But Grand Committees have their Powers and Rules in other Circumstances given them in express words by the House, as to send for Witnesses, to hear Council or assign them on either part, to send for Records. . . . When any great business is in agitation that requires much Debate, or a Bill for a Publique Tax is to be committed, the House doth use to resolve itself into a grand committee of the whole House, which is done by a question, and then the Speaker leaves his chair, and the committee (which must consist of as great a number as constitutes a House, as is before declared,) makes choice of a chairman. If the num-

(*a*) See, as to this, 'Law Magazine,' vol. xv. 1851; Cox's 'British Commonwealth,' ch. xix.

The commissioners are sometimes authorized by the commission to receive evidence on oath. By 14 & 15 Vict. c. 99, s. 16, "Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

bers be equal, the chairman hath the casting vote; otherwise he hath no voice in the committee. . . . If the committee cannot perfect the business at that sitting, they may not adjourn, as other committees, but a question is to be made for reporting to the House, and that leave be asked that the committee may sit at another time upon the same business"(*a*).

In the following account of committees of the whole House, the order of topics adopted in the foregoing extract may be conveniently followed. In the first place, with respect to the purposes for which committees of the whole House are constituted; they appear to be comprised in the following enumeration:—i. Committees to initiate certain bills. ii. Committees to which certain bills are committed after they have been read a second time. iii. Sessional and occasional committees.

i. *Committees to initiate certain bills.*—By a standing order of 1707, founded on the long-established practice of the House of Commons(*b*), the House will not proceed upon any petition, motion, or bill, for granting any money, but in a committee of the whole House. The effect of this order will be further considered under the head of "Supply." Again, by an order of 1772, "no bill relating to trade, or the alteration of the laws concerning trade," is to be brought into the House before it has been referred to a committee of the whole House. A later order of the same year provides similarly, that "no bill relating to religion, or the alteration of the laws concerning religion," shall be brought into the House before it has been referred to a committee of the whole House. The standing order as to bills relating

(*a*) 'Memorials of the Method and Manner of Proceedings in Parliament.' by H. S. E. (Elsynge), ch. 8.

(*b*) In 1621 the practice was similar, as appears by the following note of a speech in the Commons in that year:—"The supply and grievances may go hand in hand, and a committee of the whole House be appointed to consider of both, but no speech now '*de quanto.*'" (Parry, 270.) By a resolution of February 18, 1668, motions for any public aid or charge upon the people are to be referred, in the first instance, to a committee of the whole House. (Parry, 557.)

to trade has been interpreted to relate, not to trade in general, but to direct interference with particular trades (*a*); and the order as to bills relating to religion has been interpreted to relate to matters of faith and doctrine, not to church discipline and temporalities (*b*).

ii. *Committal of bills after a second reading.*—Every public bill after it has been read a second time is referred to a committee of the whole House, for the purpose of detailed examination of the bill. This part of the practice of the House will be more conveniently considered when we come to treat of the manner of passing public bills.

iii. *Sessional and occasional committees of the whole House.*—About the time of James I. a practice commenced of appointing at the beginning of a Parliament five standing committees (which were in some cases grand committees, or committees of the whole House)—for privileges, religion, grievances, courts of justice, and trade. The ancient standing grand committees have fallen into disuse, and no standing committees of the whole House appointed sessionally now sit, except the Committees of Supply, and Ways and Means, which will be considered hereafter (*c*).

The ancient sessional committees to which we have just referred were formerly considered of great constitutional importance. Sir Edward Coke says, "The Commons in Parliament assembled being the generall inquisitors of the realm, have principall care in the beginning of the Parliament to appoint days of committees, viz. of grievances (both in the Church and Common-wealth), of courts of justice, of priviledges, and of advancement of trade" (*d*). Subsequently Charles I. expressed a different opinion of them. In the declaration of the causes of dissolving Parliament in the fourth year of his reign, A.D. 1629, he says, "We are not ignorant how much that House hath of late years endeavoured to extend their privileges by setting up general committees for religion, for courts of justice, for trade, and

(*a*) Bourke's Decisions on Points of Order, 2nd ed. p. 342 *et seq.*
(*b*) *Ibid.* 320. (*c*) Dwarris, 182. (*d*) 4 Inst. 11.

the like; a course never heard of till of late; so as where in former times the knights and burgesses were wont to communicate to the House such business as they brought from their countries, now there are so many chairs erected, to make inquiry upon all sorts of men, where complaints of all sorts are entertained to the insufferable disturbance and scandal of justice and government; which having been tolerated awhile by our father and ourself hath daily grown to more and more height"(*a*).

The practice of regularly appointing certain committees (grand as well as select) at the commencement of each session, sprang up at the introduction of the practice (which, as has been stated, became regularly established in the time of Elizabeth) of proroguing the same Parliament from year to year. During the reign of Elizabeth we find select committees for subsidies appointed in the Commons pretty regularly at the beginning of every session; and a similar practice as to committees of privileges which usually inquired into controverted elections(*b*). Committees of all kinds became very frequent in the reign of James I., as appears by reference to the annals of Parliament in that reign, and the provisions then made for the regulation of the business of committees(*c*). The increase of the business of committees regularly appointed, may probably be attributed to the regular prorogation of Parliaments, an innovation of which the constitutional importance seems to have received less attention than it deserves. It is clear that regularity in the sessions of Parliament tended to promote regularity in the conduct of its business, and therefore to increase its powers. In the subjoined note instances are given of some of the committees of the whole House, held in the reign of James I., and the early part of the reign of Charles I(*d*).

(*a*) Parry's 'Parliaments,' 332. (*b*) *Ibid.*, reign of Elizabeth, *passim.*

(*c*) Thus, in 12 James I., the House of Commons ordered that orders for committees for each day should be regularly set upon the door of the House. (Parry, 265.)

(*d*) 12 James I.: A general committee of the whole House, for receiving

In committees of the whole House, every member may speak as often as he pleases(*a*); it is obvious that in the examination of the details of a bill in committee, it would be very inconvenient to restrain members by the strict rules of regular debates. The committee considers only those matters which are referred to it upon its appointment, or subsequently by the *instructions* of the House(*b*).

In the House of Lords a chairman is appointed at the commencement of each session, who takes the chair in all committees of the whole House, unless the House otherwise appoints(*c*). In the House of Commons the chairman of ways and means, who is appointed sessionally, usually takes the chair of committees of the whole House(*d*).

A committee of the whole House of Commons consists of at least forty members, and if it appear that so many are

petitions, is ordered to meet weekly. 18 James I.: A committee of the whole House to consider supply and grievances. 19 James I.: A committee of the whole House to consider a message from the King for dispatch of business; the King, in another message, having affirmed the liberties of the House to be by toleration, a committee of the whole House is appointed to consider its privileges. A protestation is prepared by this grand committee, and subsequently erased by James with his own hands. In the same year, 19 James I., the Lords appoint a committee of the whole House and judges to consider the power of courts to compel Lords to answer on oath. 21 James I.: The Duke of Buckingham's statement of his negotiations in Spain is made in a committee of the whole House of Lords. 1 Charles I.: A committee of the whole House of Commons to consider the state of the kingdom and the royal revenue. 2 Charles I.: The Commons' House is turned into a grand committee on the King's address to both Houses (in which he had complained of unparliamentary proceedings). 3 Charles I.: Committees are appointed, with the days of meeting, for religion, the courts of justice, grievances, and trade. 4 Charles I.: A committee of the whole House to consider the King's speech; report from the grand committee, with the draft of a Petition of Right. The Commons send this petition to the Lords, and explain, with regard to certain alterations in it, "that they had voted it at a committee not in their House, for otherwise they could not alter any part thereof." In the next session, a committee of the whole House to consider whether the Petition of Right has been invaded. (Parry's 'Parliaments,' under the dates cited.)

(*a*) 2 Hatsell, 105.

(*b*) Rules and Orders of the H. of Com., Nos. 202, 240.

(*c*) Macqueen, 62.

(*d*) Rules and Orders of H. of Com., No. 200.

not present, the chairman immediately leaves the chair and the Speaker resumes it(*a*).

A committee of the whole House does not adjourn like other committees. At the end of each sitting, the chairman leaves the chair and the Speaker resumes. If the committee have not finished its business, and resolve to sit again, the chairman (in the House of Commons), upon the Speaker resuming the chair, reports progress, and asks leave to sit again. In that House, when any committee of the whole House (except of supply, or ways and means) has reported progress, and is ordered to sit again on a particular day, the Speaker, on the order being read, quits the chair without putting any question(*b*). But in other cases the resolving into committee of the whole House is done by question, and the amendments may be moved to the question that the Speaker do leave the chair.

Select committees are either committees on bills—or sessional—or occasional committees. Of the former class we shall speak in considering the manner of passing bills.

The greater number of select committees appointed every sessions are election committees (already noticed), and committees on private bills. There are also some other select committees regularly appointed at the commencement of each session in the House of Commons. We have already referred to the Committee on Public Petitions, to which by a standing order, petitions after they have been ordered to lie on the table are referred. This committee is sessionally appointed, as are also the Standing Orders Committee and the Printing Committee. The functions of the former relate to private bills, and will be considered hereafter; the latter selects, and arranges for printing, returns and papers presented to the House.

The objects for which occasional select committees are appointed are too numerous for enumeration or classification. Some of the purposes for which such committees have been appointed may however be briefly mentioned.

(*a*) 2 Hatsell, 176. (*b*) Standing Order, July 19, 1854.

Formerly select committees were sometimes appointed to draw up subsidy bills(*a*). Committees have been appointed for the abridgment and reformation of the statutes(*b*), to examine into the proceedings of courts of justice(*c*) on the practice of the House for dispatch of business(*d*). It has been already observed that committees are frequently appointed to draw up addresses to the Crown, and to prepare reasons to be offered at conferences. In modern times select committees have been frequently appointed to investigate the operation of particular laws and bills proposed for their amendment.

It has been the uniform practice of the Commons, if they have occasion to know formally what the Lords have done with respect to any bill or other measure depending, to appoint a committee to search the Lords' journals, and to report the proceedings of the House. To entitle the Commons to this right, it is not necessary that the subject matter of the search should have originated in the House of Commons(*e*).

In the House of Commons the most usual number of members of a select committee (except committees on elections and private bills) is fifteen. Members are frequently added to committees, and others discharged from attend-

(*a*) So appointed in 18 Elizabeth, 29 Elizabeth, 35 Elizabeth, 39 Elizabeth, etc. (Parry, 223, 228, 232, 236.)

(*b*) 35 Eliz. (on the motion of Mr. Francis Bacon), 39 Eliz., 18 James I., 18 Charles II. (Parry's 'Parliaments,' under the respective dates.)

(*c*) 18 James I. On report from this committee, Bacon is accused of corruption. (Parry, 276.)

(*d*) 19 Charles II.; Parry, 555.

(*e*) 3 Hatsell, 32 *et seq.* The Lords do not adopt the same practice with respect to the Journals of the House of Commons, but refer, if necessary, to the printed copies of those Journals. Hatsell raises the question whether, if the printing were discontinued, the Lords would be entitled to inspect the Journals of the Commons, and considers the answer to depend on the debated point, whether the House of Commons is a Court of Record.

When the Lords have made amendments in a money bill, or other bill which the Commons cannot, with regard to their peculiar privileges, adopt, they frequently appoint a committee to search the Lords' Journals and report the amendments, with the view to the introduction of a new bill with the amendments. (Dwarris, 341; Bristowe, Private Bill Legislation, 39.)

ance. Five is the usual number of a quorum, except where the House has directed otherwise. Before nomination of any member on such select committee, it is usual to ascertain that he is willing to attend; and it has been held that a member ought not to be required to attend when he is adverse to the object for which the committee is appointed(*a*).

In select committees evidence is very commonly taken, and, whenever it is necessary, the House gives the committee power to send for persons and papers(*b*). The minutes of evidence are usually printed. Except in the case of secret committees, strangers are usually allowed to be present at the taking of evidence, but not at the deliberations of the committees. Secret committees have been appointed on various public emergencies, as the committee to examine the physicians of George III. during his last mental disorder in 1810, the committee to examine witnesses to be produced in the trial of Lord Wintown, for High Treason, in 1715, the committee to examine papers relating to the political "corresponding societies," in 1794(*c*).

In the Lords' committees the chairman may always vote on a division, but in committees of the House of Commons has only a casting vote, except in election committees and committees on private bills, where he may vote in all divisions, and has also a casting vote(*d*).

Committees usually sit during the daily adjournments, and during the morning sittings of the House, but not during the evening debates. Committees cannot, without leave, sit during other than the daily adjournments, nor can they sit after the prorogation of Parliament(*e*).

Some of the most important legislative enactments have

(*a*) Parry, 255, 266; Standing Order, 25th June, 1852.

(*b*) Rules and Orders of H. of Com., No. 229.

(*c*) 2 Hatsell, 155, 161–2.

(*d*) Commons' Standing Order, 101.

(*e*) Standing Orders, 25th June, 1852; 21st July, 1856. In 30 Charles I., in accordance with previous precedents, a committee was ordered to sit in a "recess of adjournment." (Parry's 'Parliaments,' 583.)

been founded upon the investigations of select committees. Where the committee make a report, it is usually ordered to lie on the table and be printed, but sometimes the House resolve to agree to the resolutions of a committee, wholly or in part, or in amendments thereon(*a*).

4. PASSING OF BILLS. The ancient method of legislation was by petition of the Commons and the answer of the King, from which petition, and answer if necessary, an Act was framed, which was entered on the statute roll, as was more fully explained in a previous chapter. Here, however, we shall confine our attention to the present and long-established method of passing bills, and in the first place shall consider that method so far as it relates to *public* bills.

These for the most part may originate in either House of Parliament indifferently; with the exception of bills that may affect the peerage, bills for restitution in blood, or of honours, and divorce bills, which begin in the Lords(*b*), and bills of supply, which commence in the House of Commons.

It has been already observed that there is a rule in both Houses, that the same bill or question is not to be offered twice in the same session. This rule is not interpreted with uniform strictness, but has been always understood to exclude contradictory matters from being enacted in the same session(*c*). Another rule affecting the initiation of bills is that already referred to, by which certain bills originate in committees of the whole House.

(*a*) 2 Hatsell, 160, 191, 205.

(*b*) Dwarris, 373. Estate bills are usually first solicited in the Lords, and bills of attainder have usually been commenced there.

(*c*) 2 Hatsell, 132. In 1606, the House of Lords laid down the following rule:—"That a bill being brought into the House and afterwards rejected, another bill of the same argument and matter may not be renewed in the same House in the same session; but if a bill begun in one House be disliked and refused in the other, a new bill to the same matter may be drawn and begun again in that House whereunto it was sent; and if a bill being begun in either House and committed, it be thought by the committees that the matter may better proceed by a new bill, it is likewise holden agreeable to order in such case, to draw a new bill and bring it into the House." (2 Hatsell, 125.)

Subject to these rules, any member of the House of Commons is at liberty to move for leave to bring in any public bill. In moving for leave to bring in a bill, it is not common to enter into a full exposition of its nature and objects, of which the debate is most frequently reserved to the second reading. If the motion be agreed to, the bill is ordered to be prepared and brought in by the mover and seconder, and occasionally other members, or a select committee. A peer is at liberty to present a bill to the House of Lords, and have it laid on the table without previous leave(*a*).

Bills are not always introduced by members on motion; some bills, brought in by order of the House, are bills founded on resolutions of a committee of the whole House. Occasionally also instructions are given to members on select committees to prepare and bring in bills(*b*).

The mode of preparation of a bill is by drawing it on paper with blanks (which, when the bill is printed, are filled up by words printed in italics) where anything occurs that is reserved to be settled subsequently, as dates, penalties, and sums of money. In this state the bill is presented; its subsequent progress is, in ordinary course, marked by five distinct stages:—i. The first reading. ii. Second reading. iii. Commitment. iv. Third reading. v. The motion that the bill do pass(*c*).

i. After a bill is prepared and presented, the question is put that it be read a first time; this motion is not often opposed, and bills are commonly read a first time on the days when they are presented, though the reading may be appointed for a subsequent day, or a motion may be subsequently made for reading the bill(*d*). When a bill is presented by a member in pursuance of an order of the House of Commons, or is brought from the Lords, the question

(*a*) Hammond, 'Practice in Parliament,' 40; Rules and Orders of the H. of Com., sec. 19.

(*b*) Hakewel, 'The Manner how Statutes are enacted,' p. 142.

(*c*) 1 Blackstone's Commentaries, 183; Hammond, 40.

(*d*) Hammond, 40.

that the bill be read a first time, and that it be printed, are decided without amendment or debate(*a*).

"At the first reading of a bill," says Hakewel, "it is not the course for any man to speak to it, but rather to consider of it, and to take time till the second reading; yet it is not altogether without precedent that a bill hath been spoken for and against upon the first reading, which is very seldom, and onely where the matter of the bill is apparently inconvenient and hurtful to the common weal"(*b*).

ii. The second reading of a bill is usually on a day subsequent to the first reading. A bill having been read a first time, is ordered to be read a second time on a future day; on the order of the day being read for the second reading, a question is put, "That the bill be *now* read a second time"(*c*). The usual course is to debate the principle of the bill upon the second reading. Sometimes however, by arrangement, the discussion of the principle of the bill is deferred. It has been already observed, that at every stage of a bill every part of it is open to amendment.

iii. Commitment of bills. After the second reading, the bill is committed(*d*), that is, referred to a committee, which is a committee of the whole House, or sometimes in the first instance a select committee. The commitment of bills to select committees is frequently adopted where the subject matter of the bills is of a technical nature, or the House desires that evidence should be taken upon it. But even where the bill is referred to a select committee, it must subsequently be considered by a committee of the whole House before the third reading(*e*).

(*a*) Standing Order, July 19, 1854.

(*b*) Hakewel, 'Manner how Statutes are enacted in Parliament,' sec. 3; 'Memorials of the Method and Manner of Proceedings in Parliament, by H. S. E.' (Elsynge), ch. 9.

(*c*) Rules and Orders of H. of Com., Nos. 351, 352.

(*d*) An order of the House of Commons, February 13, 1621, dispensed with the commitment of a bill, "if nobody speaks against." (Parry's 'Parliaments,' 40.)

(*e*) Blackstone, Comm., 183; Rules and Orders of H. of Com., sec. 19.

In committee of the whole House on public bills, the preamble is discussed last. The chairman puts the question as to each clause in succession that it stand part of the bill, or, when an amendment is proposed, that the clause, as amended, stand part of the bill. Instructions given by the House to the committee frequently enable it to receive clauses, and make provisions in bills which could not otherwise have been entertained. By a standing order of the House of Commons, it is an instruction to all committees of the whole House to which bills may be committed, to make such amendments therein as they shall think fit, provided they be relevant to the subject matter of the bill; but that if any amendment shall not be within the title of the bill, they amend the title, and report the same specially to the House. Also in going through the bill, words printed in *italics*, commonly called "blanks," stand, unless objected to. If a clause is offered to be added in committee, it is read a first time without question put. But after a bill has passed through committee, a new clause cannot be added without notice(*a*).

At the close of the proceedings of a committee of the House of Commons on a bill, the chairman *reports* the bill forthwith to the House. When amendments have been made, they are received without debate, and a time appointed for taking them into consideration(*b*).

On the consideration of the report, whether taken at once or deferred to a future day, the House reconsiders the whole bill, and the question is repeatedly put upon every clause and amendment(*c*). At this stage also, further amendments may be made, and fresh clauses added. The bill is sometimes re-committed, and this course is generally adopted where it is requisite to make extensive altera-

(*a*) Standing Order, July 19, 1854. (*b*) *Ibid.*

(*c*) 1 Blackstone's Comm., 183. "The clerk ought to read every amendment and interlining twice, that so it may have as many readings as the rest of the bill hath had." (Hakewel, 'Manner how Statutes are enacted,' p. 148.)

tions in it(*a*). A bill may be re-committed generally, or on amendments proposed on the consideration of the report, or with instructions to the committee to make additional provisions. There may be several recommittals of the same bill(*b*).

iv. Third reading. After the final consideration of reports of committees of the House on bills, the next stage in their progress is the third reading. In the House of Commons no amendments, not being merely verbal, can be made in any bill on the third reading(*c*).

v. When the bill has been read a third time, the Speaker puts the question that the bill do pass. If this be agreed to, the *title* of the bill is then settled(*d*). A title is properly no part of an Act of Parliament; it not being read three times as every other part of a law is, and is only proposed when it is to be sent from one House to the other(*e*).

After the title is settled, the bill is transmitted to the Lords with the superscription, *soit baillé aux seigneurs*, or, where first passed by the Lords, it is transmitted with the note, *soit baillé aux communes*(*f*).

In 1668, the Lords made a standing order, that in bills coming up near the time of adjournment, no argument shall hereafter be used (as shortness of time) to precipitate the passing of such bills, but that due consideration may be had according to the course of Parliament(*g*). And recently an order has been made by the House of Lords limiting the reception of bills from the Commons to a period of the session when there is a sufficient time for considering the bills in the House of Lords.

When a bill begun in the one House is sent to the other, it passes through its successive stages there. If the bill originally begun in the Lords passes the Commons without amendments, it is returned with the note, *a cest*

(*a*) Rules and Orders of H. of Com. No. 374.
(*b*) Dwarris, 272.
(*c*) Standing Order, July 19, 1856.
(*d*) 1 Blackstone, 183.
(*e*) 16 State Trials, 743 *n*.
(*f*) Hakewel, 'Manner how Statutes are enacted,' p. 155.
(*g*) Parry's 'Parliaments,' 558; Lords' Standing Order, 35.

bille les communes sont assentus. If a bill sent by the Commons to the Lords be there rejected, no more notice is taken(*a*), but it passes *sub silentio,* to prevent unbecoming altercations. But if it be agreed to without amendments, the Lords send a message that they have agreed to it(*b*), and the bill remains with them (unless it be a bill of supply). But if any amendments be made, they are sent down with the bill to receive the conference of the Commons, and the bill is subscribed *a cet bill avecque les amendments a mesme bill annexes les seigneurs ont assentus.* If the Commons agree to the amendments, the bill is sent back to the Lords with the note, *a cest bille avecque les amendments les communes sont assentus* (*c*). If, however, the Commons disagree to the amendments, a conference usually follows, as has been already stated. If both Houses remain inflexible, the bill is dropped, since one House cannot reject merely the amendments insisted upon by the other, but must either receive the bill with such amendments or reject it altogether. The same forms are adopted, *mutatis mutandis,* whichever House the bill originates in. If to a bill coming from the one House any proviso or entirely new matter be added by the other, the former House may object to offer additions thereto. It is

(*a*) By a resolution of the House of Commons already noticed (*ante,* p. 152), the demand for a conference is to come from the House which is in possession of the bill; so that if the Lords do not return a bill sent from the Commons, the latter have no direct means, by conference or otherwise, of coming to any agreement upon it. (Report to the House of Commons on the Practice as to Supply, 1860, s. 13.)

(*b*) In some few instances bills which have passed both Houses have been offered for and received the Royal assent before this message of agreement has been communicated. (2 Hatsell, 339 *n.*)

In the following instance in modern times, the omission of the consent of the one House to amendments of the other House has been corrected by a subsequent Act of Parliament. The Act 10 Geo. IV. c. 63, reciting that an Act relating to factories had been sent by the Commons to the Lords, and had been there agreed to, with an amendment, but before the Commons had agreed to such amendment, had been accidentally included among the bills which received the Royal assent, enacts that this Factory Act shall be valid.

(*c*) Hakewel, p. 164.

held for a general rule that neither House may of themselves put out anything which they have before passed, otherwise than requested by the House which hath not passed the same. The rule seems much the same with interpolations and additions. But it admits of this qualification, that all alterations may be made which are necessary to give effect to amendments agreed to by both Houses(*a*).

When both Houses have done with any bill, it is always deposited in the House of Lords, to await the Royal assent, except in the case of a bill of supply, which, after receiving the concurrence of the Lords, is sent back to the House of Commons, and is presented by the Speaker of that House(*b*).

On pressing emergencies, bills have been frequently passed through all the stages in the same day, in both Houses; but a bill cannot pass through more than one stage in a day in the upper House, without a suspension of its standing orders(*c*).

Passing of Private Bills.—We have already observed on the distinction between public and private bills, and the difficulty, in some cases, of distinguishing between them(*d*). Many bills promoted as private bills, largely affect public as well as private interests, and in dealing with such bills, Parliament exercises both judicial and legislative functions. The combination of these functions is constitutionally objectionable, for reasons already pointed out(*e*), and Parliament has, to some extent, effected a separation between them in passing bills, by referring private bills to select committees. But as these tribunals exercise both legislative and judicial functions, and for other reasons, the present method of passing private bills is subject to grave objections.

(*a*) 1 Blackstone's Commentaries, 184; Hammond, 'Practice in Parliament,' 43; Hakewel, sect. 6.

(*b*) Hammond, 45.

(*c*) Hakewel, p. 141; Lords' Standing Orders, 37, 38.

(*d*) *Ante*, p. 19. The private bills to which the standing orders are applicable, are divided by those orders in two classes. The first class enumerates twenty subjects, relating principally to corporations, charters, church building, local improvement, police and local governments. The second class enumerates twenty subjects, relating to roads and other engineering works.

(*e*) *Ante*, p. 2.

The general regulations (prescribed principally by the standing orders of the two Houses) for passing private bills, may be classed under these several heads:—i. The steps preliminary to petitioning for the bill. ii. The petition. iii. The first and second readings. iv. The committee. v. Consideration of the report, and third reading.

i. The private bills to which the standing orders are applicable, chiefly relate to local improvements, municipal regulations, and public engineering works. Notices of the intention to bring in any bill for any of these purposes have to be given in newspapers circulating in the localities affected, together with various particulars of the powers intended to be applied for. Where powers to take land or houses are to be applied for, due notice is also to be given to the owners and occupiers affected. Where lands are to be taken for engineering works and the like, plans and sections showing the nature of the proposed works, and other documents, are to be deposited with the clerks of the peace of the counties in which the works are proposed to be made, and certain other officers; plans and sections of railways are deposited at the Board of Trade, and the proper offices of the Houses of Parliament, and with certain parochial officers(*a*).

In the case of railway bills, a sum equal to eight per cent. of the estimated cost, and in the case of bills for certain other engineering works, four per cent. of the estimated cost, is to be deposited with the Court of Chancery in England or Ireland, or the Court of Exchequer in Scotland, at a certain period before the bill is introduced into Parliament(*b*).

ii. By the standing orders of the House of Commons, no private bill can be brought into that House, except upon petition which has been some time previously deposited in the private bill office. To every petition is annexed a

(*a*) Lords' Standing Orders, 180 *et seq.*; Commons' Standing Orders, 12 *et seq.*

(*b*) Lords' Standing Orders, 184; Commons' Standing Orders, 56 *et seq.*

printed copy of the bill(*a*). Certain officers, called examiners of standing orders for private bills, are appointed on behalf of both Houses, to inquire whether the preliminaries to the introduction of private bills into Parliament have been duly complied with. By a recent improvement, the same examiner examines the same bills for both Houses. The promoters of each bill are required to prove compliance with the standing orders of both Houses. The promoters produce to the examiner a statement showing all matters required to be proved, and opposite each proof the name of the witness to prove it. Each witness is then examined, and the other necessary proofs are given. Any parties are entitled to be heard upon a sufficient memorial addressed to the examiner, complaining of non-compliance with the standing orders. When he has heard the petitioners and memorialists, or their agents, the examiner gives his decision, and indorses on the petition whether the standing orders have been complied with. If he decides that they have not been complied with, he states the grounds of his decision (*b*).

If the indorsement of the examiner show that the standing orders have been complied with, the promoters proceed to obtain leave to bring in the bill, and have it laid on the table of the House for the first reading. If the examiner has reported that the standing orders have not been complied with, the petition is referred to the Standing Orders Committee, to report whether the standing orders ought to be dispensed with, or the promoters allowed to proceed with the bill. If, on the report of this committee, the bill is allowed to proceed, with certain alterations in the bill, it must be reprinted with those alterations.

iii. In order to the first reading of a private bill in the House of Commons, a petition for leave to bring it in is first presented, by being deposited at the private bill office; and, where the petition has been referred to the Standing

(*a*) Commons' Standing Orders, 156.

(*b*) Blackstone's Private Bill Practice, 10-15.

Orders Committee, the leave of the House to proceed with the bill is first obtained. A certain interval of time is required to elapse between the first and second readings, during which the bill remains in the custody of the Private Bill Office. After the second reading, the bill is committed(*a*).

iv. If the bill be a railway or canal bill, it is referred to the General Committee on those bills; if a divorce bill, to the committee on divorce bills; all other bills are referred to the "Committee of Selection."

The general committee on railway and canal bills, groups the bills, and refers every opposed bill or group of bills to a committee of five members, the chairman being appointed by the general committee, and the four other members appointed by another committee, which is designated the "Committee of Selection"(*b*).

The select committees on all private bills except those just mentioned and divorce bills, are five members nominated by the Committee of Selection(*c*).

The select committee nominated in the manner just mentioned, inquires into the allegations of the bill, and has different duties, accordingly as the bill is or is not opposed.

A bill will be treated as opposed when a petition has been duly presented against it, and in some other cases.

A petition against a private bill must state distinctly the grounds of objection to it, and must be presented to either House within a few days after the second reading there, except where the petition complains of anything arising before the committee, or of any proposed amendment or additional provision. The committee will hear petitioners against a bill whose interests are affected by it. In the case of railway bills, the committee inquires into the financial arrangements for making the proposed railway, and its en-

(*a*) Commons' Standing Orders, 159 *et seq.*
(*b*) Bristowe, 17; Commons' Standing Orders, 3–7.
(*c*) Commons' Standing Orders, 8.

gineering merits. Numerous restrictions in the powers to be conferred upon railway companies are imposed by various standing orders, and by other standing orders instructions are given to the committees on railway bills to insert therein various clauses. It will not be necessary to consider here the special duties of the committees on other classes of private bills, beyond stating that they institute various inquiries respecting them, which vary according to the nature of the bills.

The committee-rooms are open courts, except when the committees are about to deliberate. The promoters and opponents of opposed bills usually appear by counsel. If the opponents of the bill be admitted to have a *locus standi* to oppose, or if upon argument the committee allow such *locus standi,* the investigation proceeds somewhat as a trial at law. The counsel for each side produce their own witnesses, cross-examine those of their opponents, and address the committee.

At the close of the general case for the promoters and opponents, the committee usually decide first whether *the preamble of the bill has been proved.* If they decide that it has not been proved, the bill is in general lost; but if they decide that the preamble has been proved, the committee proceed to consider the bill, clause by clause, and to hear petitioners who have prayed to be allowed to insert certain clauses, or to be heard against others.

When the committee have settled the bill, they make their report. The report is, in all cases, to show whether the committee have agreed to the preamble or gone through any of the clauses, and any alteration in the preamble, or the withdrawal of the bill(*a*). After the committee have made their report, a copy of the bill, with their amendments, is delivered to the Private Bill Office, and the bill is subsequently reprinted, with the amendments. On or before the consideration of the report, the chairman of the committee of ways and means is to inform the House

(*a*) Commons' Standing Orders, 123.

whether the bill contains the several provisions required by the standing orders.

v. The next stages in the progress of a private bill in the House of Commons, are the consideration of the report of the select committee, and the third reading. Any clauses or amendments to be proposed at these stages are referred to the chairman of ways and means, who is to signify whether they ought to be entertained by the House, or referred to the Standing Orders Committee. If they be so referred, and that committee report against them, the House will generally refuse to allow them to be inserted; or on the report of that committee, or if the House orders it, the bill will be referred back to the former select committee. When a bill has been reported, the House may agree or disagree to the amendments of the committee, and add amendments of its own; but this is not often done. No amendments not merely verbal, can be made upon the third reading. After the third reading the bill is passed, and sent to the other House.

In the House of Lords, the procedure as to most private bills resembles that in the House of Commons; but with respect to those private bills which usually originate in the Lords, viz. estate, name, divorce, and naturalization bills, there are some peculiar regulations, which however it will be unnecessary to consider here. With respect to other private bills, if alterations have been made, or be sought to be made in them, after their introduction into Parliament, the Lords require in the appropriate cases a deposit of plans and sections, notices by advertisement, etc., similar to the preliminaries to the introduction of a bill into Parliament.

After the bill has been read a first time in the House of Lords, the examiner reports whether the standing orders have been complied with. If he report that they have not, it is referred to the Standing Orders Committee, to consider his report and whether the standing orders ought to be dispensed with. Any petition to be heard against a bill must be presented within a limited time after the first reading.

All bills sent from the Commons which are unopposed in the Lords, are referred to the "chairman of committees," who is assisted by his counsel, and upon whom, as upon the chairman of ways and means in the House of Commons, rests an important responsibility as to unopposed bills. He may report that a private bill, though unopposed, should be treated as opposed, and then it will be referred to a select committee, like an opposed bill. The reference of such bills takes place after the second reading.

The proceedings before the select committee of the Lords are similar to those before the committee of the Commons. The committee, after hearing the promoters and opposers to an opposed bill, make their amendments, and report the bill to the House. No amendment can be moved on the consideration of the report or third reading, unless previously submitted to the chairman of committees.

If the bill, as sent up from the Commons, be not altered in the Lords, it receives the Royal assent, without going back to the Commons. The passage of such bills through the Lords is facilitated by the practice of laying copies before the Lords' chairman of committees and his counsel while the bill is in the Commons, so that suggestions may be made by him before the bill reaches the House of Lords. The bill, if it be amended in the upper House, is returned to the Commons with the amendments. If they be there agreed to, the bill is sent back to the House of Lords, to await the Royal assent. If the Commons make amendments on the Lords' amendments, the bill is returned to the Lords accordingly. If the Lords agree to the amendments of the Commons, the bill is ready for the Royal assent; but otherwise a message is sent by the Lords for a conference, and the Commons, if they dissent from the Lords' amendments, demand a conference. When the bill is finally settled, it is ready to receive the Royal assent; or if the two Houses cannot agree, the bill is lost(*a*).

(*a*) The foregoing account of the passing of private bills is epitomized from the Standing Orders and Bristowe's 'Private Bill Legislation.'

In 1858, a committee of the House of Commons on railway and canal legislation reported, "that it would be desirable to make arrangements for a portion of the private business in each session being commenced in the House of Lords." In pursuance of this report, an order was made that the chairman of ways and means should, at the commencement of each session, seek a conference with the chairman of committees of the House of Lords, for the purpose of determining in which House private bills should be first considered(*a*); and the House of Commons made an order to allow private bills imposing tolls and charges to be commenced in the House of Lords. The latter order is stated under the next head of "Supply."

5. SUPPLY.—The revenues of the Crown are of two kinds, —prerogative and parliamentary. The former are ancient revenues, now for the most part surrendered by the Crown, and put under the control of Parliament, as we shall see hereafter, and consist of the profits of lands which from time to time have become vested in the Crown, originally at the Conquest, or subsequently by forfeiture, escheat, or otherwise, and various casual profits accruing to the Crown in virtue of certain of its ancient prerogatives.

All these, however, form now but a small part of the revenue appropriated to the Crown for the service of the State; by far the greater part of that revenue consists of supplies periodically granted by Parliament. The grants by the people to the Crown have in ancient times borne the names of aids, talliages, scutages, and subsidies. We have already adverted(*b*) to the antiquity of these grants; to the recognition by the Magna Charta of John of the right of tenants-in-chief of the Crown to be summoned to a common council of the realm in order to give validity to any extraordinary aid to the Crown; and to subsequent confirmations of that right by many of his successors. As the fundamental law

(*a*) Bristowe, 'Private Bill Legislation,' 74.
(*b*) *Ante*, ch. 3.

on this subject had been shamefully evaded under many succeeding princes, by compulsive loans and benevolences, extorted without a real and voluntary consent, it was made an article in the Petition of Rights, 3 Charles I., that no man shall be compelled to yield any gift, loan or benevolence, tax, or such like charge, without common consent by Act of Parliament; and lastly, by the Bill of Rights, 1 W. and M. s. 2, c. 2, it is declared that levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

Before considering the existing practice as to money bills, it will be expedient to state the separate powers of the two Houses of Parliament with respect to—i. The initiation. ii. The amendment. iii. The rejection of money bills.

i. The House of Commons has now the exclusive right of originating all supplies to the Crown; but before this right was established, grants were made by various parts of the community separately. Thus, in the eighth year of King John, A.D. 1207, the prelates and magnates made a grant for themselves, but refused to concur in a grant from the inferior clergy, and thereupon writs were addressed to the latter, requiring separate aid from them(*a*). The clergy were for a long period subsequently assembled in two distinct conventions, wholly unconnected with the Parliament, for the purpose of granting an aid to the Crown separately and distinctly. This practice of requiring separate grants by the clergy, probably arose from the ancient claims of the clergy of exemption from all temporal power in their spiritual character, and consequently with respect to property, which they distinguished as their spiritualities. The separate taxation of the clergy continued until the time of Charles II., and since it has been discontinued the beneficed clergy have, in recompense, been allowed to vote at the election of knights of the shire(*b*).

(*a*) Parry's 'Parliaments,' 21.

(*b*) Blackstone's Comm. 311; 1 Rep. on the Dignity of a Peer, p. 284.—

It would be easy to multiply instances of separate grants by different parts of the community in ancient times. Sometimes the Temporal Lords made a separate grant for themselves, and the Commons a separate grant for themselves(*a*); sometimes the Temporal Lords and representatives of shires united in a grant, and the burgesses made a separate grant. In the reign of Richard II. the practice seems to have been for the Lords and Commons to settle by mutual consultation the amounts to be granted by the laity; and

At a Parliament, 4 Rich. II., A.D. 1380, the clergy insisted "that their grant was never made in Parliament, nor ought to be so." Subsequently, however, the grants of the clergy were illegal till confirmed by Parliament. See Blackstone, *ubi supra*.

(*a*) In 34 Edw. I., A.D. 1306, the prelates, barons, and representatives of counties make one grant, and the citizens and burgesses another. In 1 Edw. II., A.D. 1307, the clergy make one grant; the counties another; the cities, boroughs, and ancient demesnes another. In 7 Edw. II., A.D. 1313, the barons and commons of the counties make one grant, the burgesses another. So also in 15 Edw. II., A.D. 1322. In 13 Edw. III., A.D. 1340, the earls and barons make a grant for themselves and their peers, and the Commons a distinct grant. In the next year there are separate grants. In 5 Edw. III., A.D. 1344, the Commons and the clergy make grants, but the Lords seem not to have made any grants, as they agreed to accompany the King to war. In a petition complaining of illegal taxation, 7 Edw. III., A.D. 1346, the Commons do not dispute the right of the Lords to make a separate grant for themselves, but only pray that the Commons may not be so charged. In 46 Edw. III., A.D. 1372, after a concurrent grant had been made by the Lords and Commons, leave is given to the knights to depart; but the burgesses are ordered to remain, and are prevailed upon to grant a continuation of duties formerly imposed on certain imports. In 4 Rich. II., 1380, the Lords consult by themselves as to a grant, and when agreed, declare to the Commons what they had resolved upon, and after long consultation the Commons grant a poll-tax. In 1381, the Commons pray "that the prelates by themselves, the lords temporal by themselves, the knights by themselves, the judges by themselves, and all other estates singly, may be ordered to treat about their charge, and that their advice may be reported to the Commons." It is answered, "that the ancient custom and form of Parliament had always been that the Commons should first report their advice to the King and Lords of Parliament, and not the contrary; and that done, the Lords' advice would be made known to them." In 6 Rich. II., A.D. 1382, after a conference, the Lords and Commons for those in Parliament, as for all laity, grant a tenth and a fifteenth. (Parry's 'Parliaments,' under the respective dates. See, for other instances of conferences upon supplies, the arguments of the Lords at the Conference of 1671, 3 Hatsell's Precedents, 407.)

in the subsequent reigns of Henry IV. and Henry V., the grants are commonly said to be made by the Commons "by the assent of the Lords," or "by assent of the Bishops and Lords" (*a*).

In 1 Henry IV. the Commons disclaiming the right of judgments in Parliament, the royal answer was that "the Commons are Petitioners and Demanders, and the King and Lords of all time had had, and ought to have of right, the judgments in Parliament, save that in a statute to be made, or in grants and subsidies, or for the common profit of the realm, the King will have their advice and assent." It has been stated by a high authority (*b*), that by this answer it was settled "that grants of aids to the Crown should proceed from the Commons." But the words of the answer do not seem to warrant that inference, if it mean that grants should be *originated* by them. A more distinct recognition of the right of the Commons to initiate grants was in 9 Henry IV., A.D. 1407. On that occasion the King, in the presence of the Lords spiritual and temporal, required a subsidy, and the Lords in answer proposed a subsidy for all the laity. A message was sent by the King to the Commons, requiring them to "take steps to conform to the answer of the Lords." To this course the Commons objected, as derogatory of their liberties; and thereupon the King, by the advice and assent of the Lords, declared that it was lawful for the Lords by themselves, and the Commons by themselves, to consult on the state of the realm, "provided always, that neither the Lords on their part, nor the Commons on theirs, should make any report to our said Lord the King of any grant granted by the Commons and assented to by the Lords, nor of the discussions on the said grant before the said Lords and Commons are of one assent and of one accord in that matter, and then in manner and form as is accustomed, that is to say, by the mouth of the Speaker of the said Commons for

(*a*) See Parry's 'Parliaments,' 159 *et seq.*

(*b*) 1 Report on the Dignity of a Peer, p. 353.

the time being; so that the said Lords and Commons shall be agreed with our Lord the King" (*a*).

It is observable that on this occasion the Commons are said to have complained, not that the grant did not originate with them, but that they were not consulted about it. It is clear also from the reference to "discussions" and to the previous practice, that the grant was matter of consultation and agreement between the two Houses; but from the words "grants granted by the Commons," from the discontinuance of separate grants by the Lords, and from the grants being thenceforth said to be made by the Commons by the assent of the Lords, it seems clear that at this time the grant of subsidies was recognized as principally within the jurisdiction of the Commons.

In subsequent reigns the subsidies are repeatedly spoken of as granted by the Commons, and Bills of Subsidies originated in that House. Still, the practice of originating supplies there was not universal. Thus, in 7 Hen. VIII., A.D. 1515, a bill was brought into the *House of Lords* concerning a subsidy, and by the Lord Chancellor carried to the Commons (*b*). In 4 & 5 Mary, A.D. 1558, the Commons, by the desire of the Lords, appoint some members to meet a committee of the Lords, and confer with them on the Queen's wants, and the state of the nation, and shortly afterwards a bill for a lay subsidy is passed (*c*). In 7 Jac. I., A.D. 1610, the Lord Treasurer explains to the House of Lords the King's wants, and demands a supply; and thereupon conferences were held between the Houses, and a supply granted, as will be mentioned again presently.

In 35 Eliz., A.D. 1593, in a debate on supply, which also will be referred to again presently, Mr. Francis Bacon says, "The custom and privilege of this House hath always been, first, to make an offer of the subsidies from hence, then to the Upper House; except it were that they present a bill

(*a*) Commons' Report, 1860, on Procedure as to Taxation, s. 3; 3 Hatsell, 148.

(*b*) Parry's 'Parliaments,' 200. (*c*) *Ibid.* 213.

to this House with desire of our assent thereto, and then to send it up again"(*a*). This admission of Bacon is the more remarkable because it occurs in an argument against the interference of the House of Lords with the Bills of Supply.

In 1628 the preamble of the Supply Bills was finally fixed as we now find it—"Most gracious Sovereign, we, your Majesty's most faithful Commons, have given and granted to your Majesty." The form was settled by a committee, consisting of Coke, Glanville, Selden, and others. The Lords objected to this form as an innovation, but finally passed the subsidy bill in which it first appeared. Immediately after the Restoration, the Commons resolved (July 21, 1660), that a bill of tonnage and poundage should commence. "The Commons assembled in Parliament do give," etc.(*b*)

"It is," says Blackstone, "the ancient and indisputable privilege and right of the House of Commons, that all grants of subsidies or Parliamentary aids do begin in their House, and are first bestowed by them; although their grants are not effectual to all intents and purposes until they have the assent of the other two branches of the legislature. The general reason given for this exclusive privilege of the House of Commons is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable if the Commons taxed none but themselves; but it is notorious that a very large share of property is in the possession of the House of Lords; that this property is equally taxable, and taxed as property of the Commons; and therefore the Commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modelling the supply. The true reason, arising from the spirit of our Constitution, seems to be this:—The Lords being a

(*a*) Parry's 'Parliaments,' 232.

(*b*) 3 Hatsell, 112; Commons' Report of 1860 on Procedure as to Taxation; Parry's 'Parliaments,' 324. In the Conference of 1671, the Lords showed that the Lords and Commons were joined in the gift until the commencement of the reign of Charles I.

permanent hereditary body, created at the pleasure of the King, are supposed more liable to be influenced by the Crown, and when once influenced to continue so, than the Commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the Lords any power of framing new taxes for the subject; it is sufficient that they have a power of rejecting, if they think the Commons too lavish or improvident in their grants"(*a*).

Blackstone adds, "that the exclusive privileges of the House of Commons, as to money bills, extend to all bills by which money is directed to be raised upon the subject, for any purpose, or in any shape whatsoever; either for the exigencies of government, or for private benefit, and collected in particular districts, as by turnpikes, tolls, parochial rates, and the like." In recent times, however, the House of Commons, in order to avoid the inconvenience of commencing in that House all private bills imposing tolls and charges, have made a standing order "that this House will not insist on its privileges with regard to any clauses in private bills sent down from the House of Lords, which refer to tolls and charges for services performed, and are not in the nature of a tax." This was a new order in 1858, framed upon the recommendation of the committee on railway and canal legislation appointed in that year(*b*). Also, by a standing order of July 24, 1849, with respect to any bill brought or returned from the Lords, relating to any pecuniary penalty, forfeiture, or fee, the Commons will not insist on their privileges where the penalty is to secure the execution of the Act, or the fees are for benefits taken and services rendered under the Act, and are no part of the public revenue, or where the Act is local or personal.

ii. *The amendment of money bills.*—According to the established practice of Parliament, the House of Commons will not permit the least alteration or amendment to be made by

(*a*) 1 Blackstone, Commentaries, 169.
(*b*) Bristowe, 'Private Bills Legislation,' 117.

the Lords in the mode of taxing the people by money bills. We have seen, however, that anciently the quantum of supplies to the Crown was commonly a matter of arrangement between the Lords and Commons. In the conferences between the two Houses in 1671 (*a*), the precedent 9 Hen. IV., A.D. 1407, was referred to, and the attorney-general asserted that the precedent showed, among other things, "that it was a grievance to the Commons, and a breach of their liberties, for the Lords to demand a committee to confer with about aids." The words of the answer in 1407 do not seem to warrant that conclusion literally; but it would seem that the attorney-general disputed the right of the Lords to demand conferences on *bills* of supply (*b*), not the right to conferences before the bills were brought in. It appears from the instances already cited, that conferences and consultations between the two Houses about supply to the Crown were common before 1407, and there are instances of such conferences and consultations long afterwards. We have already referred to that of 4 & 5 Mary. The debate in 35 Eliz., A.D. 1593, which has also been already referred to, arose upon a vote of the House of Commons granting certain supplies, and the demand of the Lords thereupon for a conference. Bacon opposed the granting a conference. "He yielded," he said, "to the subsidy; but misliked that this House should join with the Upper House in the granting of it . . . In joining with them in this motion, we shall derogate from ours, for the thanks will be theirs, and the blame ours, they being the first movers. I wish we should proceed as heretofore, apart by ourselves, and not join with their Lordships." However, after great debate, a

(*a*) 3 Hatsell, p. 416.

(*b*) Speaking of Bills of Supply, he says,—"*When they are begun*, the Lords can neither add nor diminish; else it was in vain to adjust the matter by private conference beforehand if the Lords could have reformed it afterwards, which shows how little service the records of 29 Edw. III. No. 11, 51 Edw. III. No. 18, can do your Lordships in the present question." These records had been cited by the Lords as precedents of conferences on supplies. (See 3 Hatsell, 414.)

conference was ultimately assented to. The Lords proposed a grant greater than that voted by the Commons. The latter objected to the proposal as an invasion of their privileges, but finally yielded(*a*).

In 2 James I., A.D. 1604, the Lords desired a conference touching a bill of subsidy, which they thought defective. They proposed that at the same time "their Lordships' desire may be propounded, that means may be considered for a relief and subsidy to his Majesty." The conference was accepted, and took place(*b*).

In 7 James I., A.D. 1610, a conference was granted by the Commons, at the desire of the Lords, on Supply, the Lord Treasurer having explained to the Upper House the necessities of the King, and demanded a supply. The result of this conference was, that the Commons desired the Lords to convey to the King their wish that some course might be taken in the matter of "Wardships and Tenures,"—certain branches of the royal revenue which it was proposed to abolish upon compensating the King. The amount of the compensation was the subject of further conferences between the two Houses(*c*).

In 23 Charles II., A.D. 1671, at a conference on a subsidy bill, the Commons objected to a clause, and the Lords agree to leave it out(*d*).

The preceding instances of conferences between the Houses of Parliament are illustrative of the growth of the fiscal powers of the House of Commons. The now-established practice of that House admits of no discussion with or amendments by the House of Lords with respect to money bills; but that practice was not completely established until after the seventeenth century. During that century there are several instances of money bills amended by the House of Lords. "It is impossible," says a recent re-

(*a*) Parry's 'Parliaments,' 232. Hatsell notices the first rejection of the conference by the Commons, but omits to mention that they subsequently agreed to a conference. (3 Precedents, 112)

(*b*) Parry's 'Parliaments,' 248; 3 Hatsell, 112.

(*c*) Parry's 'Parliaments,' 297.

(*d*) *Ibid.* 562.

port to the House of Commons(*a*), "in all cases to ascertain, at this distance of time, the exact nature of such amendments. In some, the amendments were made for the purpose of preserving to the Peers the ancient custom of assessing themselves by commissions of their own; in others, the amendments were made for correction of clerical errors, or in furtherance of the intent and object of the bill; and in one or two cases the Commons agreed on special grounds, such as "the present necessity cast upon them by the shortness of the session." With these exceptions, it appears from the journals that this House has reserved to itself the exclusive power over such bills, by not allowing any alterations of a substantial character."

The claims of the House of Commons with respect to money bills were disputed by the Lords in the conferences of 1671 and 1678. The arguments at those conferences contain an ample account of the progressive resistance of the Commons to the interference of the Lords with bills of supply. It appears clear that, until the latter part of the reign of Charles II., the Commons, though they insisted on originating such bills, did not exclude the right of the Lords to amend them. In 1671, considering that the Lords, under the pretence of making such amendments, inserted matter "which had the appearance of trenching on the privileges of the Commons," the latter laid down the rule more largely than theretofore, "that in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords." Within a very few years after, in 1678, the doctrine is carried still further; and the Commons resolve that all supplies are their sole gift, and that the "ends, purposes, considerations, conditions, limitations, and qualifications of such grants" ought not to be altered by the House of Lords. From the end of the seventeenth century these claims have been seldom or but faintly controverted by the Lords(*b*).

iii. *The rejection of money bills.*—The House of Lords

(*a*) Report, 1860, on Procedure as to Taxation, s. 7.
(*b*) 3 Hatsell, 152.

has repeatedly rejected bills for the imposition or repeal of taxes, and that right has been repeatedly admitted by the House of Commons. Thus, in the conferences of 1671 already referred to, the Lords contended that if they could not amend bills, "a hard and ignoble choice is left to the Lords, either to refuse necessary supplies, or to consent to ways and proportions of aid which they deemed inexpedient." The Commons' answer does not dispute the right of the Lords to reject, but argues that the King was subject to the alternative of which the Lords complain. "The King," say they, "must deny the whole of every bill or pass it; yet this takes not away his negative voice." And with regard to the power of the Lords to reject bills of all kinds, the Commons observe that the two Houses are mutual checks upon each other, "for your Lordships have a negative to the whole. But on the other side, it would be a double check upon his Majesty's affairs if the King may not rely upon the *quantum* when once his people have given it." It is clear from this answer that the Commons then allowed the right of the Lords to reject money bills altogether, but disallowed their claim to vary the *quantum*.

In 1860, the House of Lords rejected a bill which had been sent up from the House of Commons for repealing duties on paper. The House of Commons thereupon appointed a Committee to search the journals of both Houses of Parliament, in order to ascertain and report on the practice of each House in regard to the several descriptions of bills imposing or repealing taxes. This committee abstained from offering any opinion on the practice as to the rejection of money bills by the Lords, but cited a large number of instances in which that right had been exercised by them without any further steps being taken by the Commons; and other instances in which, on the rejection of such bills, the Commons passed other bills on the same subject, and sent them to the Lords. The dates of the precedents thus cited range from 1714 to 1858.

The House of Commons, upon receiving this report, resolved, 7 July, 1860, that although the Lords had sometimes exercised the power of rejecting bills relating to taxation, that power was regarded by the House of Commons with "peculiar jealousy," and "that to guard for the future against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over taxation and supply, this House has in its own hands the power so to impose and remit taxes and frame bills of supply, that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate"(*a*).

In the following session (1861) the House of Commons, departing from its former practice, passed a bill (the Customs and Inland Revenue Bill), in which measures for the repeal of some taxes and the imposition of others were combined. The House of Lords was thus precluded from treating those measures as distinct, and rejecting either of them separately. The Lords passed the bill, but not without a protest from several Lords against the course taken by the House of Commons, on the ground that it was contrary to usage, and that measures of supply and repeal of taxes ought not to be combined in the same bill (*b*).

The language of text-writers upon the right of the Lords to reject money bills is uniform. Thus Blackstone says, "It is sufficient that they have a power of rejecting, if they think the Commons too lavish or improvident in their grants"(*c*). De Lolme, speaking of money bills, says, "The Lords are expected simply and solely either to accept or reject them"(*d*). Indeed it seems clear that the following consequences would attend a loss of the power of the Lords to reject money bills:—The sending them to the House of Lords would be an idle form; and if that form were dispensed with, the principal inducement of the Crown to

(*a*) Commons' Journals, vol. cxv. p. 360.
(*b*) Lords' Journals, vol. xciii. p. 378.
(*c*) 1 Blackstone, Commentaries, 169.
(*d*) On the Constitution, book i. ch. 4.

summon Parliament, viz. the need of annual supplies, would cease as to that branch of the legislature. Again, if the Lords had no power of rejecting money bills, they would be the only portion of the community having no voice in the imposition of burdens borne by them in common with the rest of the community.

In treating of the somewhat complicated subject of modern fiscal legislation, it will be convenient to consider separately the three branches of it:—i. Grants of Supplies. ii. Ways and Means. iii. Money Bills. The first relates to the grant of money to the Crown; the second to the means by which that money is raised. The third head relates to the manner in which the supply and ways and means receive their final authority from Acts of the whole Parliament. It is believed that by keeping these subjects entirely distinct, the explanation of them will be greatly simplified.

i. *Grants of Supplies.*—The public expenditure of this country (exclusive of that of a local kind, which is met by local rates and assessments) consists of two kinds: first, expenses *periodically* (usually annually) sanctioned by Parliament; secondly, of various expenses *permanently* charged by various statutes either on the Consolidated Fund or on particular branches of the revenue. The Consolidated Fund is the united produce of various taxes and other branches of revenue, which are paid into the Bank of England, and disbursed in a manner which will be explained under the head of Fiscal Administrative Offices(*a*).

The statutory charges upon the Consolidated Fund which do not come under the annual examination of Parliament, are numerous. The principal of them are the annual sum

(*a*) The Consolidated Fund was originally created by the Act 27 Geo. III. c. 47, by which various duties and taxes were to be "carried to and constitute a fund, to be called the Consolidated Fund." The Consolidated Funds of England and Ireland were united by 56 Geo. III. c. 98; and by 1 Vict. c. 2, various hereditary revenues of the Crown were carried to the Consolidated Fund.

for the maintenance of the Royal Household and Civil List, and Royal Family, the salaries of ambassadors, judges and certain judicial officers, etc.; the largest item payable out of the Consolidated Fund being the interest of the national debt(*a*).

An important change in the mode of providing for expenses charged on the Consolidated Fund was effected by the statute 17 & 18 Vict. c. 94. The object of that statute was "to bring the gross income and expenditure of the United Kingdom and the Isle of Man under the more immediate view and control of Parliament." The statute accordingly provides, first, that certain charges, not previously so paid, shall be paid henceforth out of the Consolidated Fund; and a large number of charges are transferred from the Consolidated Fund and particular branches of the permanent revenue, to be paid henceforth "out of such aids or supplies as may be from time to time provided and appropriated by Parliament for that purpose"(*b*).

The charges transferred by this statute from the annual supplies to the Consolidated Fund are salaries of certain judges and judicial officers in Scotland, compensations to various persons for loss of fees and annuities, and one or two others. The sums which are transferred from the Consolidated Fund to the annual Supplies, include salaries of various administrative officers, and expenses of courts of law, except judicial salaries.

The annual grants of Parliament are now classified under the heads of navy services, army services, and civil services(*c*), and these grants are all recommended by the Crown before they are voted by Parliament. By a standing order of the House of Commons, that House will receive

(*a*) 1 Blackstone, Comm., 333. (*b*) 17 & 18 Vict. c. 94, s. 1.

(*c*) The Civil Service grants are arranged in seven classes: 1. Public Buildings and Works; 2. Salaries and Expenses of Administrative Offices in this Country; 3. Police and Administration of Justice; 4. Arts, Science, and Education; 5. Salaries of Governors and Colonial Establishments; 6. Superannuation Allowances and Charitable Donations; 7. Miscellaneous. (See Appropriation Act for 1860, 23 & 24 Vict. c. 131.)

no petition for any sum of money relating to public service, or proceed upon any motion for granting public money, but what is recommended from the Crown(*a*); and the practice of the House has long been in accordance with this rule. It is however subject to this exception, that occasionally the House agrees to address the Crown to advance money for a particular purpose, and gives assurances that the expenses so incurred shall be made good by the House. The effect of these addresses will be considered presently.

Upon the principle of the standing order just referred to, the House of Commons will not take into its consideration any application for the public money without a message from the Crown, or the recommendation of the Crown signified by some member of the House(*b*).

The Committee of Supply, as it is commonly termed, is a committee of the whole House appointed to consider of the *quantum* of the supply which the House by a former vote has agreed to grant to the Crown. This committee is appointed by virtue of a standing order of 1667(*c*), which continues substantially unaltered to the present time, and by which any motion in the House for public aid or charge on the people is to be referred at a future day to a committee of the whole House before any resolution or vote of the House do pass therein. The Committee of Supply considers the money to be voted for the *current year*. Where money to be voted is not part of the service for the current year, —for instance, an augmentation of judges' salaries,—it is as regular to propose it in any other committee of the whole House as in the Committee of Supply(*d*).

This committee, as it takes its origin from the aids de-

(*a*) Standing Order, June 25, 1852. (*b*) 3 Hatsell, 196.

(*c*) Before that time the supply was frequently referred to a select committee. Thus a "select and grave committee, both to consider of the dangers of the realm, and of speedy supply and aid to her Majesty," was nominated in 35 Eliz., A.D. 1593, on the motion of Mr. Francis Bacon. A select committee of supply was appointed in 1597. In 1601, there is a committee of the whole House for supply. (Parry's 'Parliaments,' under the respective dates.)

(*d*) 3 Hatsell, 194 *n*.

manded by the Crown, can properly have no cognizance of any matters but such as are laid before the House of Commons, by the direction of the Crown, for the public service; and therefore, if it be thought desirable at any time to vote a sum of money in the Committee of Supply which is not intended for the service of the army, or navy, or ordnance, or any other aid demanded by the Crown, the House must, in order to entitle the committee to take this matter into their consideration, enable them so to do by a particular instruction. After the Committee of Supply is closed, it cannot be opened again but by a new demand of money from the Crown(*a*).

Almost the sole exception to the rule that propositions for charges on the people are to be first considered in a committee of the whole House, is the practice already adverted to, of addressing the Crown to advance money for a particular purpose, with an assurance that the House will make good the expenses so incurred. This practice has indeed been generally confined to small sums, and to services the amount of which cannot be immediately ascertained. It has been also used for the most part at the end of the session, when the Committee of Supply is closed, and when the sum required has not been thought of sufficient magnitude to adopt the form of opening that committee again. Another occasion of resorting to an address of this kind is, where the proposal is not advocated by the ministers of the Crown, and consequently the previous consent of the Crown cannot be obtained. "This proceeding of voting money by address," Hatsell observes, "is contrary to the words and spirit of the standing order of 1667, and ought not to be permitted without apparent necessity"(*b*). By a modern standing order the House will not proceed on a motion for such an address but in a committee of the whole House(*c*).

The Royal speech, which at the commencement of every session declares the cause of summons of Parliament,

(*a*) 3 Hatsell, 168, 193. (*b*) *Ibid.* 178.
(*c*) Standing Order, February 22, 1821.

states that *Estimates* for the public service will be laid before the House of Commons. These estimates are referred to the Committee of Supply(*a*). The sums voted by the House of Commons for the different services are those which appear sufficient on the consideration of the Estimates; but it not unfrequently happens that in some of the services the sums so voted are exceeded, and the excess has to be provided for in subsequent years(*b*). Whenever after a war measures have to be proposed for paying off or providing for any part of the "unfunded debt," the regular mode of proceeding is, first, in Committee of Supply, to come to resolutions that so much money be granted, or that provision be made for this purpose, and then in Committee of Ways and Means to provide the mode of discharging such part of the debt(*c*).

The "unfunded debt" consists principally of Exchequer bills, which are of the nature of temporary loans to the Government(*d*). In every year, before the business of the Committee of Supply closes, grants are made from time to time of money on account, to be raised by Exchequer bills or loans. These grants are founded on *votes of credit*, and the regular practice appears to be to vote such supply of

(*a*) Rules and Orders of the H. of Com., No. 404.

(*b*) 3 Hatsell, 190 *n*, 210. For example, in the Appropriation Act of 1860, s. 12, an expenditure for the army services beyond the grants of the preceding year is provided for. Hatsell complains that in some instances to which he refers the grants were so largely exceeded that the votes of the House of Commons and Appropriation Bills were rendered ridiculous and nugatory.

(*c*) 3 Hatsell, 198 *n*.

(*d*) After the Restoration it was usual with a few of the great bankers to accommodate the Crown with large sums of money on the credit of the growing produce either of taxes granted by Parliament, or of the hereditary revenue; and tallies and orders of the Exchequer were given for paying both principal and interest out of the first moneys from the funds pledged as a security. On one occasion Charles II., to supply his necessities, resorted to the desperate expedient of shutting up the Exchequer and postponing the payment of these orders. The first Act of Parliament regulating the issue of Exchequer Bills appears to be the 12 Will. III. c. 1, "An Act for renewing the Bills of Credit, commonly called Exchequer Bills." (See the Case of the Bankers in the Exchequer, 14 State Trials, 1.)

credit in the Committee of Supply, and to come to a resolution in the Committee of Ways and Means, that a sum equal to that amount be raised by loans or Exchequer bills, to be charged on the next aids to be granted by Parliament(*a*). The form in which this arrangement is provided for by the legislature will be mentioned presently.

The resolutions of the Committee of Supply are reported to the House. The House may either agree or disagree to them, or if of opinion that the subject has not been sufficiently canvassed, may recommit the whole or any part of the report for the purpose of receiving more accurate information, or more narrowly inquiring into the nature and expediency of the measure proposed. If on consideration of the report it be thought necessary to increase the sum granted by the Committee of Supply, the resolutions must be recommitted. The House may indeed *lessen* the sum proposed without the intervention of a committee, but to increase the sum would be to impose a charge not previously resolved upon in committee(*b*). Upon the resolutions as finally settled is founded the Appropriation Act, to be considered presently.

The chairman of the Committee of Ways and Means is usually the chairman of the Committee of Supply; he is appointed sessionally, and has various functions with respect to private bills which have been previously considered.

Occasionally, the grants for the services of the current year are not all voted in the same session of Parliament. Thus, in 1841, in anticipation of a dissolution of Parliament, the naval and army services were voted, and the miscellaneous services for six months of the year 1841; the remaining grants for the financial year were voted a few months afterwards in the new Parliament(*c*). A similar course was adopted in 1857(*d*).

(*a*) 3 Hatsell, 214. (*b*) *Ibid.* 177, 180.

(*c*) See 4 & 5 Vict. c. 53, s. 19, and 5 Vict. c. 11. By each of these Acts the sums granted by them were to be applied exclusively to the services of the sessions in which they were granted. By 5 & 6 Vict. c. 1, that restriction was removed, and the sums granted were made applicable to the services of the whole financial year.

(*d*) The Appropriation Act of the first session of 1857, 20 Vict. c. 20, au-

ii. *Ways and Means.*—The object of the Committee of Ways and Means is, as is expressed by the title of it, to determine the modes of raising the money which the House (upon resolutions reported from the Committee of Supply, and agreed to) have granted to the Crown; and the first consideration attending this proceeding is, that the money proposed to be raised upon the subject by loans, or taxes, or any other mode, should not exceed the sum granted in the Committee of Supply. It is for this reason incumbent on the Chancellor of the Exchequer, or whatever member of the House of Commons(*a*) proposes the ways and means for the current year, to explain and show to the House, by a detail of the sum granted for the several services, that the amount of those sums will be a sufficient justification in point of quantity to the Committee of Ways and Means to adopt such measures and impose such taxes as shall be then recommended to them. This explanation is made most frequently by the Chancellor of the Exchequer or (but rarely) by the first Lord of the Treasury, and usually in the Committee of Ways and Means. This financial statement is called the Budget(*b*).

thorizes the issue of various sums of money, "on account," for the various services. In the first session of the next Parliament (in the same year) the remaining grants for the year were appropriated by the Act 20 & 21 Vict. c. 69.

(*a*) For obvious reasons, the office of the Chancellor of the Exchequer is given by the Crown to a member of the House of Commons. By ancient usage, on a vacancy of this office, the seals of it are delivered to the Chief Justice of the King's Bench for the time being, who does formal acts till a successor is appointed. It thus happened in 1757 that Lord Chief Justice Mansfield continued nominally Finance Minister for more than three months; and, says Lord Campbell, "speculations began to be formed how, being a peer, he was to open the Budget." ('Chief Justices,' vol. ii. p. 448.)

See further, as to the office of Chancellor of the Exchequer, the chapter on Fiscal Administrative Officers, *infra*.

(*b*) 3 Hatsell, 197.

"The Chancellor of the Exchequer, before or soon after the close of each financial year, submits to the House of Commons a general statement of the results of the financial measures of the preceding sessions, and gives a general view of the expected income and expenditure of the ensuing year. He intimates, at the same time, whether the Government intends to propose

The Committee of Ways and Means, being specially appointed for considering such propositions only as may raise the supply granted in the current session of Parliament, cannot properly take any other matters into their consideration, without particular powers given them for that purpose by instructions from the House. Therefore where it is found necessary to impose taxes, or to charge duties, which are not to be applied to the service of the year, this, if done in the Committee of Ways and Means, ought to be done by special authority from the House: but it may be done with more propriety in another committee of the whole House appointed for the particular purpose. Nevertheless, by a neglect of these rules, taxes have in several instances been voted in the Committee of Ways and Means without previous authority for the purpose, not only for the supply of the present year, but also prospectively for subsequent years(*a*).

The taxes which are raised upon the subject by the authority of Parliament are either temporary or perpetual; that is, are imposed for limited or unlimited periods. Among the permanent taxes, the most considerable are the *customs*, which are levied upon exports and imports, and take the place of the ancient subsidies tonnage and poundage, and the *excise duty*, which is an inland imposition, paid by the manufacturers and vendors of various commodities. The original establishment of excise duties was in 1643, by the Parliament, after its rupture with Charles I.(*b*).

Certain ancient duties formerly belonged to the Crown hereditarily, but these have long ceased, and since the Revo-

the repeal of any taxes, or the raising of money by taxes, or by loan, or otherwise. . . . The intention of this Budget statement is not only to lay before the House of Commons the scheme of taxation for the ensuing year, but to satisfy them that the public income to be raised in the year will be sufficient, and no more than sufficient, to meet the expenditure which the Government proposes to incur during the year." (Memorandum by the Chancellor of the Exchequer: Report to the House of Commons on Public Moneys, 1857, Appendix No. 1.)

(*a*) 3 Hatsell, 199. (*b*) 1 Blackstone, Comm., ch. 8.

lution all taxes have (as we have seen) been imposed by Parliament. The Parliamentary taxes were until the time of Charles II. all temporary. The customs were at first usually granted only for terms of years, and subsequently for the King's life(*a*), as in the reigns of Charles II. and his two immediate successors. The customs were first made perpetual in the reign of Queen Anne(*b*). The excise duties first made perpetual appear to be those granted to the Crown in 1660, by 12 Car. II. c. 24, as a recompense for the profits of "Wards and Tenures" thereby abolished. The next tax imposed perpetually by Parliament was that of Hearth-money(*c*), granted by 14 & 15 Car. II. c. 10, in 1662. These statutes are historically interesting, as they indicate the origin of a most important change in the financial system of this country.

The Committees of Supply, and Ways and Means, are fixed for those days of the week on which (as has already been explained) orders of the day have precedence of notices of motion(*d*).

The resolutions of the Committee of Ways and Means, when reported to the House, may, like resolutions of the Committee of Supply, be accepted, rejected, or recommitted(*e*). Of the resolutions of the Committee of Ways and Means,

(*a*) Henry VII. and Henry VIII. had each a subsidy of tonnage and poundage granted to him by Parliament for his life. (2 State Trials, 450, 451, *in notis*.)

(*b*) 1 Blackstone's Commentaries, ch. 8.

(*c*) This tax, under the appellation of Fumage, or Smoke Money, existed at the Conquest, and was known under the name of Funge or Focage in the reign of Edw. III. It was so unpopular at the time of the Revolution, that one of the first Acts of William III. was to get it repealed; but soon afterwards it was replaced by a window duty, and duties on windows or houses have been continued to the present time. (See Burnet, A.D. 1689; 1 Blackstone's 'Commentaries,' ch. 8.)

From the dates given in the text it appears that there is a slight error in the statement in Mr. May's interesting 'Constitutional History,' vol. i. p. 475, that "Hearth-money was the first permanent tax, imposed in 1663." He adds that no other tax of that character appears to have been granted until after the Revolution, when permanent duties were raised on beer, on salt, on vellum and paper, on houses, and coffee.

(*d*) Standing Order, July 19, 1854. (*e*) 3 Hatsell, 180.

Blackstone observes, that when approved by a vote of the House, they "are in general esteemed to be (as it were) final and conclusive. For though the supply cannot be actually raised upon the subject till directed by an Act of the whole Parliament, yet no moneyed man will scruple to advance to the Government any quantity of ready cash on the credit of a bare vote of the House of Commons, though no law be yet passed to establish it"(*a*).

iii. *Money Bills.*—These are Tax bills, Bills of Supply, and bills for the Appropriation of Supplies.

Tax bills, for raising revenues to be applied towards the services of the current year, are, as has been already observed, founded upon resolutions of the Committee of Ways and Means. The Acts commence (with occasional verbal variations) as follows:—"Most Gracious Sovereign, we your Majesty's most dutiful and loyal subjects, the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, towards raising the supply granted to your Majesty, [*or* towards raising the necessary supplies for defraying your Majesty's public expenses, and making a permanent addition to the public revenue] (*b*), have freely and voluntarily resolved to grant unto your Majesty the duties hereinafter mentioned; and do humbly beseech your Majesty that it may be enacted, and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal in this present Parliament assembled, and by the authority of the same, as follows." These bills, like bills of supply, are presented for the Royal assent by the Speaker of the House of Commons(*c*).

We have already referred to the practice of voting supplies of credit from time to time. Upon the resolutions of the Committee of Ways and Means to grant such *interim* supplies, are founded the Supply Bills which are passed from time to time during the session(*d*). The form of the

(*a*) 1 Commentaries, 308. (*b*) 23 & 24 Vict. c. 111. (*c*) 3 Hatsell, 160.
(*d*) Thus six such grants were made from time to time during the session

preamble is similar to that of tax bills just stated, except that instead of "towards raising the supply" are the words "towards making good the supply." The form of one of these supply bills is as follows:—It provides that a specified sum shall be applied for the service of the year; that the Treasury may cause Exchequer bills for that amount to be made out; that the Bank of England may receive such Exchequer bills, and advance to the Exchequer a sum not exceeding the sum granted by the Act; that the Treasury may cause such Exchequer bills to be delivered to the Bank of England as security for such advances; that the money raised by these Exchequer bills may at any time be applied by the Treasury to such services "as shall then have been voted by the Commons of the United Kingdom." The sums contained in the Exchequer bills are charged on the growing produce of the consolidated fund unto the end of the quarter after their issue, and are payable with interest out of the Exchequer funds in the Bank of England.

When the Committees of Supply, and Ways and Means, are closed, the House of Commons pass an *Appropriation bill*, in which the *final* grant of the session is made in a form similar to that just mentioned;—the previous grants are recapitulated;—and the whole are directed to be applied to those services which have been voted in that session in the Committee of Supply; the particular sums granted for each service are specified, and it is directed that the supplies shall not be applied to any other than the purposes mentioned in the Appropriation Act.

The measure of appropriating the grants of the Commons to be applied to particular services was occasionally resorted to by Parliament in very ancient times, but was not frequently carried into effect, until after the Restoration (*a*).

of 1860. The first of these grants is to make good a deficiency of the grants of the preceding year; the rest are grants for the service of the current year.

(*a*) The Report of the House of Commons in 1860, already referred to, states that "the appropriation of supplies to specified heads of expenditure was introduced in the reign of Charles II.;" and Mr. May, in his 'Consti-

The extravagance of Charles II., and the several pretences used by him for obtaining supplies which he immediately misapplied, rendered this course necessary; and though it was strongly reprobated by Lord Clarendon and other ministers, the necessity of securing to the public use the money granted, induced the House of Commons to carry the measure into effect(*a*).

After the Revolution, this system of appropriating the revenues was carried out to a much larger extent than before. All the grants intended for the service of the current year were, in the Act of Parliament which carried those grants into effect, applied and strictly appropriated to that specific purpose; and that practice of inserting all grants in the general Appropriation Act of each session has continued ever since, except in some few cases, where the appropriation of the grants has been provided for

tutional History,' makes a similar statement. But there were much earlier instances. By 14 Edw. III. stat. 2, A.D. 1320, the grant thereby given is to be spent on the national defence and wars. By 5 Ric. II. stat. 2, c. 3, a subsidy thereby granted is to be wholly employed upon a naval force. One of the articles of the impeachment of Michael de la Pole, in 11 Ric. II., A.D. 1388, was that he had allowed revenue which had been granted by Parliament for a particular purpose to be expended in another manner, so that the sea was not guarded. (1 State Trials, 91.)

By 21 Jac. I. c. 34, subsidies are granted, which are to be employed exclusively in repair of certain decayed towns, and for managing the expected war; treasurers are appointed to see the money duly applied. (See also 3 Hatsell, 102 and note.) The Commons, in the reign of Charles I., adopted a regular practice of appointing commissioners to receive subsidies granted to the Crown. (Clarendon, History, vol. i. book 3.)

(*a*) The first of these appropriation clauses of the time of Charles II., was proposed by Sir George Downing, an officer of the Exchequer, to be inserted in a Bill of Supply, which had been drawn in the ordinary form without such a clause. The King informed his ministers who opposed the clause, that it had been proposed with his sanction. From Lord Clarendon's account of the transaction (the continuation of the 'Life of Edward, Earl of Clarendon,' fol. ed., p. 315 *et seq.*), it may be surmised that one of the King's motives in sanctioning the clause, was to evade applying the money to the repayment of loans which had been made to him by several bankers.

In 1680, Sir Edward Seymour, Treasurer of the Navy, was impeached for issuing moneys for purposes other than those to which they had been appropriated by Parliament. The impeachment was interrupted by the dissolution of Parliament. (8 State Trials, 127.)

by separate Acts, and some cases of local and personal grants(*a*).

The clause of appropriation in the bill granting an aid to the Crown in the first year of William and Mary, was drawn by Somers, then Solicitor-General, and Mr. Sacheverel, by the special direction of the House of Commons. By that clause it was enacted, that out of the money in the Exchequer, specified sums should be appropriated to the particular services; all money received by collectors was to be paid in due course into the Exchequer, and the officers of the Exchequer were rendered liable to very severe penalties if they permitted any sums to be appropriated otherwise than the Act provided(*b*).

The mode of appropriation varied throughout the reigns of William III. and Anne. Sometimes the produce of the duties was applied in the same Act, by which they were authorized to be levied; in other instances, moneys that had been levied by the Act were appropriated by another of the same session; sometimes sums were specifically applied in different proportions to particular services; at other times the sums were appropriated generally to the army, navy, and ordnance, without specifying the particular sum for each service. But the practice has now been long established of specifying the particular sums for each service which have been voted during the session(*c*).

It has long been usual for the Treasury, during the session of Parliament, to direct the application of any of the grants to the services voted by the House of Commons in that session; and this before any appropriation by Act of

(*a*) In 1727, 1728, and again in 1734, clauses were introduced into the Appropriation Acts, enabling the Crown to apply sums of uncertain amount and not previously voted in the regular way. The Lords protested against the clause introduced in 1727, that it rendered ineffectual the appropriation of public money; and in 1734 they protested that "this new method of unappropriating money raised for particular uses frustrates and eludes the wisdom and caution of Parliaments in the original grant of those moneys which is always in consequence of estimates laid before the other House and for services specified." (3 Hatsell, 190 *n.*)

(*b*) 3 Hatsell, 203 *n.*, 520. (*c*) *Ibid.* 205.

Parliament. This they have been accustomed to do from the convenience it produces to the public service, and in the confidence that before the session closes an Act of Parliament will pass, which, by appropriating the grants to the different public services, will thereby confirm and authorize that proceeding. But if the session ended without the resolutions of the House of Commons being carried into effect by a law, the votes would be as if they had never been passed, and the officers of the Treasury and Exchequer would be without any authority to apply the revenue to the public service(*a*).

In 1784, the House of Commons resolved, that "to pay, or direct or cause to be paid, any sum or sums of money, for or towards the support of services voted in the present session of Parliament, after the Parliament shall have been prorogued or dissolved, if it shall be prorogued or dissolved before any Act of Parliament shall have passed appropriating the supplies to such services, will be a high crime and misdemeanor." This resolution was carried by the opponents of the King's ministers, with a view to avert a threatened dissolution of Parliament. The dissolution however took place. In the interval before the next session, a portion of the revenue, not appropriated by Act of Parliament, was applied to the public service, but the sum was very small, and the issue was allowed in the next Parliament(*b*).

The modern form of the Appropriation Act is as follows:—It commences by making the final grant of the session. This grant is made in precisely the same form as the previous grants on account, and is such a sum as is requisite to make the total amount of grants equal to the total amounts which have been voted for the various public services(*c*). All the amounts so granted are then recapitu-

(*a*) 3 Hatsell, 207. (*b*) *Ibid.* 90, 209.

(*c*) "The Speaker of the House of Commons is considered to represent the House in all matters of finance brought before it, and to control all proceedings in reference thereto. As the session proceeds, he takes care that any bill for giving ways and means to the Treasury is kept within the

lated, and next all the amounts voted for the several services, and it is provided that the latter shall be paid out of the former. Then follows the appropriation clause: —"The said aids and supplies, provided as aforesaid, shall not be issued or applied to any use, intent, or purpose whatsoever other than the uses, intents, or purposes, before mentioned, or for the other payments, appropriation, or application, directed to be made or satisfied thereout by any Act or Acts, or any particular clause or clauses for that purpose, contained in any other Act or Acts of this session of Parliament." Then follows a provision that the expenditure for navy and army services shall be confined to those services respectively, but that in case it be indispensably necessary, the proportions assigned to any of the separate departments of each for those services may be varied, provided that the total for each service be not exceeded. The Act contains some further provisions as to half-pay of officers, which need not be here stated (*a*).

The manner in which the observance of the Appropriation Act is secured, will be considered under the head of "Fiscal Administrative Officers." It will be sufficient here to state that the security for the proper appropriation of the public money consists partly in the powers given to the Comptroller-General of the Exchequer,—an officer who is rendered independent of the ministers of the Crown by his permanent tenure of office,—and partly in the independent audits of accounts of expenditure which are annually laid before Parliament.

6. SUMMARY JURISDICTION.—Under this head we shall

amount of the votes in supply previously granted; and at the close of the session he checks the final balance between the full amount of the votes in supply (including the sum required to cover the interest of Exchequer supply bills) and the ways and means already granted, and limits the final grant of ways and means in the Appropriation Act to that amount." (Memorandum by the Chancellor of the Exchequer; Report to the House of Commons on Public Moneys, 1857, Appendix No. 1.)

(*a*) 22 & 23 Vict. c. 131.

consider the independent powers which each House of Parliament has to vindicate its authority and privileges.

The privileges of Parliament are of a twofold kind:—first, those belonging to members personally; secondly, those which relate to each House in its collective capacity. Of the former, all that will be necessary to observe here is, that personal privilege of Parliament is now confined to freedom from arrest in civil suits. A peer is, by the privilege of peerage, always exempt from such arrest; a commoner is so, by the privilege of Parliament, during its sittings, and, according to the received opinion, for forty days after every prorogation and forty days before the next appointed meeting; but this privilege does not exempt from arrest in proceedings for criminal offences(*a*).

Of the privileges which relate to each House in its collective capacity, we have already considered that of freedom of debate, so far as concerns the immunity from control by the Crown(*b*). In this place we have more particularly to treat of the *vindicative* powers of each House; that is, its independent power to vindicate its authority and punish breaches of the privileges which belong to it in its collective capacity.

It seems indisputable that the vindicative summary jurisdiction of the House of Commons, like their jurisdiction of controverted elections, did not belong to them according to their original jurisdiction, but was acquired by gradual usurpation. Prynne expresses himself very strongly on this subject. After an elaborate examination of the prece-

(*a*) For a more exact account of these personal privileges, see Hatsell, vol. i.; Dwarris on Statutes, 138 *et seq.*; Parry's 'Parliaments,' xxxvi., and the authorities there cited.

In 1763, Wilkes, a member of the House of Commons, was committed by a Secretary of State's warrant for a seditious libel in the 'North Briton,' No. 45. He obtained a writ of *habeas corpus*, and was discharged by the Court of Common Pleas, on the ground of privilege of Parliament. Subsequently, in the same year, the two Houses resolved "that privilege of Parliament does not extend to the case of writing and publishing seditious libels." (19 State Trials, 981.)

(*b*) *Ante*, c. 6, sec. 3.

dents relating to it, he says, "These forecited presidents in all ages, will sufficiently prove the late objected presidents for the Commons' sole judicial authority and jurisdiction in cases of privilege and elections, and the suspending, ejecting, fining, secluding, imprisoning their own members, and such who violate their privileges, or make false returns, to be a meer late groundless innovation, if not usurpation, upon the King, House of Peers, and Chancellors of England, no ways grounded on the law and custom of Parliaments, as Sir Edward Coke mistakes, but point-blank against them both; and that the statutes concerning elections, and attendance or absence of knights and burgesses . . . give them not the least title of jurisdiction in cases of elections or privileges" (*a*).

Scarcely any branch of constitutional law has been subject to more discussion (*b*) than the extent of the powers of the Houses of Parliament to punish offences. It is obvious that this quasi-criminal jurisdiction is peculiarly exposed to popular jealousy, because it is a jurisdiction exercised without any of those safeguards of the liberty of the subject which are given by the forms of procedure before the ordinary criminal tribunals. In this place no attempt will be made to classify the offences cognizable by each House of Parliament, since many of the precedents on this subject are obsolete, and others of them are of doubtful authority; but some selected instances will be cited which seem to most clearly illustrate the nature and extent of summary Parliamentary jurisdiction.

The ancient Parliaments, which sat only for short periods, do not appear to have exercised a power of punishing breach

(*a*) 'A Plea for the Lords and House of Peers,' p. 412. Prynne denies the legality of the summary jurisdiction of the Commons altogether; but Mr. Hargrave considers that this is an extreme opinion, to which Prynne was led by a desire to exalt the power of the House of Lords at the expense of that of the Commons. (Hargrave's 'Juridical Arguments and Collections,' vol. i., Case of Bond and Butler.)

(*b*) A considerable list of controversial writings on this subject is given 8 State Trials, 13.

of privilege; nor does there appear to be any instance of the exercise of that power by either House until the reign of Henry VIII., when the practice of continuing Parliaments for long periods commenced. At an earlier period, the personal privileges of members of Parliament were protected by the Crown on petition or by Acts of Parliament(*a*). The earliest instance of direct interposition by either House to vindicate its privileges, seems to be in 34 Hen. VIII., when, *after consultation with the King and the judges,* the Commons release, by their serjeant, George Ferrers, one of their members who had been arrested for debt, and commit to prison the sheriffs and bailiffs who resisted their authority. The next instance is 4 Edw. VI., when a person was committed to the Tower for assaulting a member(*b*).

In the reign of Elizabeth, several instances are found of persons committed for assaulting members, and other breaches of privilege(*c*). In this reign are the earliest cases of Parliament punishing scandal or libel. In 1559, one Trower was committed to the serjeant, for contumelious words against the House of Commons. In 1580, Hall, a member of the House, was committed to the Tower, and fined and expelled, for publishing a book against the authority of the House. In this reign also, a curious instance occurs of the punishment of bribery by the House of Commons. In 1571, Thomas Long, "a very simple man, and unfit," purchased his seat for Westbury, by giving £4 to the mayor and another. The House of Commons imposed a fine of £20 upon the corporation and inhabitants of Westbury, and ordered that the £4 should be returned(*d*).

After the accession of James I., complaints of breach of privilege became frequent, but most of these were cases of

(*a*) 1 Hatsell, ch. 1.

(*b*) 8 State Trials, 8; 1 Hatsell, 53, 59, where it is considered that the doctrine for the first time laid down in Ferrers's case with respect to privilege of Parliament was due more to Ferrers being a servant of the Crown than to his being a member of the House of Commons.

(*c*) 1 Hatsell, ch. 2. (*d*) *Ibid.* 93, 299; Parry's 'Parliaments,' 221.

interference by the Crown with the freedom of debate, (a subject which has been considered in a former chapter,) or related to the personal immunities of members and their servants from civil process.

The most remarkable instance of punishment by the Houses of Parliament in the reign of James I., is Floyd's case. This case is instructive, as showing clearly the danger which would result from permitting either branch of the legislature to possess a general criminal jurisdiction. In 1621, the House of Commons proceeded against Edward Floyd, for speaking contemptuous words against Elizabeth, daughter of James I., and her husband, the Elector Palatine. There could be no pretence for considering such an offence as a breach of the privileges of the House of Commons, and yet that House, after a debate(*a*), which consists principally of suggestions by different members of various ferocious modes of punishing Floyd, condemned him to ride ignominiously through the streets, to be exposed in the pillory, and pay £1000 fine. The day after this flagrant attempt of the House of Commons to exceed their powers, they received a sensible message from the King, thanking them for their zeal, but suggesting a doubt "whether the liberty of this House can warrant us or give us power to sentence one who is no member or offender against the House, nor any member of it." From the ensuing debate it is clear that the Commons recognized the error they had fallen into, and they endeavoured to extricate themselves

(*a*) In a note to these debates, by Lord Treasurer Harley, it is said, "For the honour of Englishmen, and indeed of human nature, it were to be hoped these debates were not truly taken, there being so many motions contrary to the laws of the land, the laws of Parliament, and public justice." (8 State Trials, 92 *n.*)

It is almost incredible at the present day that the offence of Floyd, who was a prisoner for debt in the Fleet, consisted in saying, while gossiping with a fellow-prisoner about the loss of Prague, "That goodman and goodwife Palsgrave were now turned out of doors, or words to that purpose; with other disgraceful speeches, as that he, the said Floid, had as much right to the kingdom of Bohemia as the Palsgrave had." (8 State Trials, 111.)

by staying execution of the sentence(*a*). Afterwards Floyd's case was taken up by the House of Lords, though clearly beyond their jurisdiction, and a still more severe sentence was pronounced by them, in accordance with which Floyd was exposed in the pillory(*b*).

Punishment by the Houses of Parliament for libel or scandal was infrequent until the latter part of the reign of Charles I., when many cases occurred of strangers committed by the House of Commons in the Long Parliament, for contemptuous words(*c*).

In 1676, Lords Shaftesbury and others, for disputing the legal existence of Parliament after its long prorogation, were committed to the Tower by the House of Lords, and were not released till they had made their submission(*d*).

A most serious extension of its summary jurisdiction was attempted by the House of Commons, after the restoration of Charles II. Burnet, in speaking of the proceedings in Parliament in 1680, says, "The Commons did also assert the right of the people to petition for a Parliament; and because some, in their counter-petitions, had expressed their abhorrence of this practice, they voted these abhorrers to be betrayers of the liberties of the nation. They expelled one Aitkins out of their House for signing one of these.... The House did likewise send their serjeant to many parts of England, to bring up abhorrers as delinquents; upon which the right that they had to imprison any besides their members came to be much questioned, since they could not receive an information upon oath, nor proceed against such as refused to appear before them. In many places, those for whom they sent their serjeant refused to come up. It was found that such practices were grounded on no law, and were no older than Queen Elizabeth's time"(*e*).

North, in his 'Examen,' is more circumstantial in his

(*a*) 8 State Trials, 99.

(*b*) *Ibid.* 112; Hargrave's Preface to Hale's 'Jurisdiction of the Lords,' p xvi.

(*c*) 1 Hatsell, ch. 4, app. 299. (*d*) 2 Hatsell, 323, 419.

(*e*) Burnet's 'History,' A.D. 1680.

account of these arbitrary proceedings of the House of Commons, and the stand made against them. The House having ordered into custody one Stavel, who, as foreman of a grand jury, had signed an address in the tenor of an "abhorrence," he refused to obey their order, alleging that it was illegal to take away his liberty on account of what he had done as a grand juryman in a court of justice. "This," says North, "was a dash of cold water, and took down the ferment of the whole business; and the matter was hushed up, some saying that he was indisposed, others that he could not be found; and so nothing was further done against him"(*a*).

After the Revolution of 1688, the Houses of Parliament entered upon a series of contests with the press, on account of publications in breach of privilege. In some of these cases the publications were libellous; in others, the offence consisted in printing and publishing the debates and proceedings of Parliament. We have already had to refer to the endeavours of Parliament, after the Revolution, to restrain the publication of its proceedings.

In 1689, Topham, serjeant attending the House of Commons, stated in a petition to the House, that actions for a false imprisonment had been brought against him by Sir Charles Neal and others, whom he had, by orders of the House in 1679 and 1680(*b*), taken into custody for "misdemeanours by them committed in breach of the privileges of the House;" that he had pleaded the orders of the House in bar to the actions, but that the judges gave judgment against him. The Commons resolved that the judgment in one of these actions (Jay *v.* Topham) was illegal, and required the judges, Sir F. Pemberton and Sir Thomas Jones, to attend before the House, and give the reasons of their

(*a*) North, 'Examen,' part 3, c. 7, s. 75.

(*b*) These are doubtless the orders referred to in the preceding quotations from Burnet and North. Topham's activity in executing these orders had given rise to the common saying, "Take him, Topham," to express any arbitrary order. (North's 'Examen,' part 3, c. 7, s. 75.)

judgment. This they did. The reasons were—not that the judges disputed the validity of the orders of the House of Commons,—but that the manner in which the order was pleaded was technically wrong, as the plea, if allowed, would have precluded the judges from inquiring whether the orders of the House of Commons had been fairly executed by the sheriff. The House, not satisfied with this explanation, committed the judges into custody, and they were not released till the prorogation of Parliament(*a*).

One or two of the more remarkable instances of the exercise of the summary powers of the Houses of Parliament during the eighteenth century may be adverted to, in addition to those already mentioned, in reference to the contests of Parliament with the press as to the publication of debates.

In 1701, a petition was presented to the House of Commons by certain justices and grand jurymen of Kent, praying the House to grant a supply to enable the King to assist his allies. The petition was couched in respectful language(*b*), but was voted by the House of Commons to be "scandalous, insolent, and seditious," and the petitioners who delivered the petition were ordered to be taken into custody of the serjeant. "This," says Burnet, "was highly censured. It was said the Commons were the creatures of the people, and upon all other occasions they used to favour and encourage petitions. This severity was therefore condemned as unnatural and without a precedent. It was much questioned whether they really had an authority to imprison any except their own members or such as had violated the privilege of the House; but the party thought it was con-

(*a*) 1 Hatsell, 282; 12 State Trials, 822; 14 East's Reports, 101 *n.*; Lord Chief Justice Ellenborough, in reference to these proceedings, said, in the case of Burdett *v.* Abbot, "it was surprising how any judge could have been committed to prison by the House of Commons for having given a judgment which no judge who sat in this place could differ from." (*Ibid.* 104.)

(*b*) A copy of this petition is given, 14 State Trials, 895 *n.*

venient by such unusual severity to discourage others from following the example of the county of Kent" (*a*).

In 1704 occurred the celebrated cases of Ashby *v.* White and the "Aylesbury men," of which an account is given in a preceding chapter (*b*). In the course of the conferences relating to these cases, the Lords communicated to the Commons certain resolutions of the House of Lords, of which the substance, so far as they relate to the summary jurisdiction of the Houses of Parliament, is as follows:—

1. That neither House of Parliament hath any power, by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament.

2. That the commencing and prosecuting an action at common law against any person (not entitled to privilege of Parliament) is no breach of the privilege of Parliament.

3. That the House of Commons exceeded their jurisdiction by committing to prison the persons who brought an action against the returning officers of Aylesbury for not allowing their votes, upon pretence that the bringing such action was contrary to a declaration of the House of Commons.

4. That every Englishman imprisoned by any authority whatsoever, has a right to a writ of *habeas corpus*.

5. That for the House of Commons to censure or punish any person for assisting a prisoner to procure a writ of *habeas corpus*, is contrary to law (*c*).

The answer of the Commons was, as to the *first* resolution, that they agreed to it; as to the *second* resolution, that to commence an action at law upon a matter solely cognizable in Parliament is destructive to its privileges; as to the *third* resolution, the Commons justify their proceeding on the ground that they have sole cognizance of election causes; as to the *fourth* resolution, "that no person committed for any contempt or breach of privilege by the

(*a*) Burnet, A.D. 1701. (*b*) *Ante*, p. 85. (*c*) 3 Hatsell, 305.

House of Commons can be discharged upon a writ of *habeas corpus*, or by any other authority than that of the House during the session of Parliament;" as to the *fifth* resolution, that the Commons committed the lawyers for conspiring to make a difference between the two Houses of Parliament, and for endeavouring to overthrow the privileges of the Commons, and that the Lords had frequently exercised the same right of committal(*a*).

After the Restoration, and during the last century, the claims of the Houses of Parliament to personal privileges were carried to their highest pitch, and alleged breaches of these privileges were punished by each House under its summary jurisdiction. Some of the instances of this extravagant exercise of their power would be nearly incredible now, if they were not well authenticated. There are repeated instances in which mere questions of civil right, such as those arising out of trespass on lands belonging to members of Parliament, were attempted to be decided by treating such trespasses as breach of privilege(*b*). It is clear that if these

(*a*) 3 Hatsell, App. No. 1.

Lord Shaftesbury, committed to the Tower by the House of Lords in 1676, was censured by the Lords for applying for a writ of *habeas corpus*, but no proceedings appear to have been taken against his counsel. All the proceedings against him were vacated as unparliamentary by the Lords in 1680. (2 Hatsell, App. No. 5.)

(*b*) The notes to almost every page of the part of Parry's 'Parliaments' which relates to the reign of Charles II., contain a multitude of instances of ordinary legal proceedings affecting the property of members of Parliament or affecting their dependants, being treated as breaches of privilege. The following, taken from page 547 of the work referred to, will suffice as specimens:—In the Lords, privilege is allowed in 1662 (*inter alia*) against several suits,—on arrest of a chaplain; against ejectment of a tenant. In the Commons, privilege is allowed against proceedings to try a title; on salt, the property of a member, detained; on hindrance in collection of tithes; etc. The following are a few of the instances of offences which the House of Commons declared to be breaches of privilege, in the last century:—1733, digging Sir Robert Grosvenor's lead; 1739, killing Lord Galway's rabbits; 1742, assaulting Sir W. Wynn's porter; 1753, fishing in Mr. Jolliffe's pond; 1759, entering on Admiral Griffin's fishery. (See collection of like cases, 9 Adolphus and Ellis's Reports, 12, *n.*)

In Lord Brougham's judgment in Mr. Long Wellesley's case (2 Russell and Mylne's Reports), he comments with just severity on Admiral Griffin's

abuses had remained unchecked, the Houses of Parliament would have ousted the courts of law of a large part of their jurisdiction, and each House would have converted itself into a judicature for trying questions of civil rights between its members and other persons.

In 1799, the House of Lords committed Benjamin Flower for breach of privilege, in publishing a libel on the Bishop of Llandaff. The case came before the Court of King's Bench upon a writ of *habeas corpus*. It was ineffectually argued that the House of Lords had exceeded their jurisdiction in committing for an offence not committed in the House and not cognizable by it. The Court of King's Bench, however, held that the Courts of Westminster could not determine a matter of parliamentary privilege which did not come "incidentally" before them, and refused to discharge the prisoner(*a*).

In the present century, the cases of privilege of Parliament which have excited the greatest public attention are those of Sir Francis Burdett, in 1810, and Stockdale *v.* Hansard, in 1836. These cases are important, since they have tended very much to settle the law as to the power of the Houses of Parliament to vindicate their privileges. In 1810, Sir Francis Burdett, a member of the House of Commons, was committed to the Tower by the order of the House of Commons for publishing a "libellous and scandalous paper reflecting on the just privileges of the House." In order to try the legality of the proceedings of the House against him, he commenced actions at law against the Speaker and serjeant. A select committee of the House of Commons reported that the bringing these actions for acts done in obedience to the orders of the House was a breach of its

fishery case. But Lord Brougham is in error in speaking of the "times of the Plantagenets, of the Tudors, or of the Stuarts, the records of which abound in extravagant dicta, and yet more extravagant pretensions of the two Houses." The summary jurisdiction of Parliament was not exercised at all during the time of the Plantagenets; moreover, the extravagant exercise was after the time of the Tudors.

(*a*) 27 State Trials, 985.

privileges; that in former cases the House had proceeded to commit the solicitors and others concerned in bringing such actions, but that such commitment would not necessarily stop the action; and the committee recommended that the Speaker and serjeant should appear to and defend the actions (*a*). The actions accordingly were defended, and in both cases the decisions were adverse to Sir Francis Burdett.

The action against the Speaker was brought in the King's Bench, when Lord Ellenborough was Chief Justice, and was for trespass, for forcible entry of the plaintiff's house and arresting him. The Speaker pleaded in justification the order of the House of Commons. In the argument on the validity of this plea, the principal question raised was, whether the Court could take cognizance of the question of privilege of Parliament, and it was argued that in the Speaker's warrant of commitment the cause of commitment ought to appear with certainty. (This position however was questioned by Lord Ellenborough.) It was also argued for the plaintiff that the judges were bound to take cognizance of privileges of Parliament when *incidentally* brought into judgment before them, though they refuse to examine questions of privilege where they are raised *directly*, as upon returns to writs of *habeas corpus*, stating privilege as the cause of commitment(*b*). This rule was admitted by counsel for the Speaker, but Lord Ellenborough asked how that distinction was to be drawn. "The question," he observed, "may be said to arise *directly* where it is the direct and immediate fruit of the judgment of the other Court, which has exclusively the power to pronounce it."

In his elaborate judgment, Lord Ellenborough said, "A competence to commit for all matters and in all cases, has

(*a*) Hatsell, App. No. 6.

(*b*) 14 East's Reports, 71.

In Stockdale *v.* Hansard, 9 Adolphus and Ellis, 144, Lord Denman said this rule was difficult of application, and commented on part of the Report on Publication of Printed Papers, ordered by the House of Commons to be printed, 8th May, 1837, which relates to this subject.

never been asserted or pretended on the part of either House of Parliament: the House of Commons does not pretend to a general criminal jurisdiction. But if the judges before whom these applications were made on writs of *habeas corpus* had felt that the Houses had no pretence of power to commit, or had seen upon the face of the returns that they had exercised it in those cases extravagantly and beyond all bounds of person and law, would they not have been wanting in their duty if they had not looked into the causes of the commitment stated? . . . If a commitment appeared to be for a contempt of the House of Commons *generally*, I would neither in the case of that court nor of any other of the supreme courts, inquire further; but if it did not *profess* to commit *for a contempt*, but for some matter appearing on the return which could by no reasonable intendment be considered as a contempt of the court committing, . . . we must look at and act upon it as justice may require, from whatever court it may profess to have proceeded" (*a*). The unanimous judgment of the court was for the defendant, and was affirmed on appeal to the House of Lords (*b*).

The judgment in the case of Burdett *v.* Abbott, though in the particular circumstances the authority of the Commons was upheld, is very important, because it distinctly recognizes the constitutional limitations of their powers, and the power of courts of law to restrain the exercise of it in certain cases.

The dicta of judges concerning privilege of Parliament have been very conflicting. In the majority of cases, the judges have refused to adjudicate in any manner on questions of privilege (*c*); and the current of authorities, during the last century, was strongly against any such adjudication. But later decisions are much more favourable to the

(*a*) 14 East, 150.

(*b*) Dow's Reports of Cases in the House of Lords, 165.

(*c*) The authorities on this subject are almost all referred to in Flower's case, and the cases of Burdett *v.* Abbott, and Burdett *v.* Colman, above cited, and Stockdale *v.* Hansard, *infra*.

powers of courts of law in this respect. Indeed, the case of Stockdale *v.* Hansard is an authority for the proposition, that the House of Commons cannot, merely by a resolution of its own, create privileges; and if such a resolution be pleaded in an action at law, the courts of law are competent to determine whether the House of Commons has such privilege as will support the plea.

Stockdale *v.* Hansard, determined in the Court of Queen's Bench in 1839(*a*), was one of a series of actions brought by Stockdale against the printers of the House of Commons, for publishing certain defamatory statements in a report ordered by the House of Commons to be printed. It was pleaded in defence, that the House had resolved "that the powers of publishing such of its reports, votes, and proceedings, as it shall deem necessary, or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament as the representative portion of it." The Court of Queen's Bench unanimously decided that the defence was invalid, and as Lord Denman said in a later case, "that there was no power in this country above being questioned by law"(*b*). In the course of his elaborate judgment in Stockdale *v.* Hansard, Lord Denman said, "It by no means follows that the opinion that either House may entertain of the extent of its privileges is correct, or its declaration of them binding," and he put the case of the two Houses making inconsistent claims of privilege, as they actually had done in Ashby *v.* White, and to cases in which the House of Commons had at different times come to opposite conclusions, as in the case of Wilkes. In these cases the claims set up could not both be valid, for they were inconsistent. Lord Denman also referred to various instances in which the personal privileges of Parliament had been strained to an intolerable degree, and had been the occasion of monstrous abuses, which were clearly examinable by courts of law, and he arrived at the conclusion (which

(*a*) 9 Adolphus and Ellis, 1. (*b*) 11 Adolphus and Ellis, 285.

was fully supported by the rest of the court), that "since the courts may give judgment on matters of privilege incidentally, it is plain that they must have the means of arriving at a correct conclusion, and that they may differ from the Houses of Parliament."

In the case just referred to, the printers of the House of Commons had been allowed by the House to plead to the action. In another action subsequently brought by Stockdale against Hansard, the printers did not plead, and judgment went by default. The sheriffs levied execution for the damages assessed, by sale of the property of Messrs. Hansard, and were ordered by the House of Commons to refund the money to Messrs. Hansard, and for refusing to do so, were committed to the custody of the Serjeant-at-Arms(*a*). The Speaker's warrant by which they were committed, recited that they had been "guilty of a contempt and breach of the privileges of this House," but did not disclose the nature of the contempt. On proceedings taken in the Queen's Bench to discharge the sheriffs by writ of *habeas corpus*, the court adhered to its decision in the preceding case of Stockdale *v.* Hansard, but held that the warrant of commitment of the sheriffs was sufficient, though it did not show the facts which constituted the alleged contempt, and that the court could not inquire into those facts upon affidavits. "It would," said Lord Denman, "be unseemly to suspect that a body acting under such sanctions as a House of Parliament, would, in making its warrant, suppress facts which, if discussed, might entitle the person committed to his liberty"(*b*). The sheriffs were therefore remanded to custody. The question of Parliamentary privilege, so far as relates to the publication of Parliamentary papers, was shortly afterwards set at rest by the Act of Parliament, 3 & 4 Vict. c. 9, by which summary protection from civil and criminal proceedings is given to persons employed in the publication of Parliamentary papers.

(*a*) Stockdale *v.* Hansard, 11 Adolphus and Ellis, 252.

(*b*) Case of the Sheriff of Middlesex, 11 Adolphus and Ellis, 273.

For reasons already stated, no classification is here attempted of the offences cognizable under the denomination of contempt or breach of privilege of Parliament. In the present state of the law on the subject, any such classification would be liable to error. The following classifications, contained in two reports of the House of Commons, may however be considered as including the offences which most commonly are punishable by the Houses of Parliament.

In a report to the House of Commons in 1771, it is said that the general heads of breaches of privilege and contempts of that House are these three:—"1st, Evasion. 2nd, Force. 3rd, Colour of Law." Offences under the first and second of these heads have been committed, by the absconding of the parties summoned, by open resistance to the officers of the House, by refusal of civil officers to assist the serjeants or messengers of the House, or to release persons entitled to the privilege of this House when detained in custody. In these cases the House has proceeded to support its privileges—1. By addressing the Crown to issue proclamations for apprehending the persons in contempt. 2. By renewing their orders against such persons, and committing them in a subsequent session of Parliament. 3. By orders to mayors, bailiffs, sheriffs, etc., to assist in apprehending them. 4. By committing those officers of the peace who refused such assistance. 5. By imprisoning those who refused to release persons entitled to the privilege of this House.

With regard to the third head, viz. breaches of privilege and contempts of the House under "colour of law," these have been committed—by discharging persons committed by the House; by impleading in courts of law, persons entitled to privilege; by prosecutions for words or actions spoken or done under the authority of the House; by accusations tending to call such words or actions in question before the courts of law, under pretended denominations of offences not entitled to privilege. In these cases the

House has proceeded—1. By taking into custody persons discharged without order of the House. 2. By directing the Speaker to write letters to judges to stay proceedings. 3. By resolutions of the House that suits and actions should be discontinued, and deemed violations of privilege. 4. By committal of judges who tried or pronounced sentence upon persons entitled to privilege(*a*).

The report to the House of Commons relative to Sir F. Burdett in 1810, enumerates these three classes of breaches of privilege of Parliament:—1. Words or writings derogatory to the honour of the House or any of its members, in which cases the House has sometimes directed prosecutions, but more frequently has vindicated its privileges by its own authority. 2. Prosecutions or actions against members or officers of the House for words or actions protected by the authority of the House. 3. Proceedings in suits against members and their servants while protected by privilege of Parliament(*b*).

With respect to the punishments inflicted by the two Houses of Parliament respectively, there is this difference:—The House of Lords assumes a power to impose fines, and to commit offenders for a specified time, which may be beyond the duration of the session; the House of Commons has long ceased to imprison beyond the duration of the session, and has abandoned the imposition of fines, but usually imposes the payment of fees as a condition of the offender's discharge.

The powers of the two Houses in these respects have been the subject of much controversy. As to the House of Commons, it is clear that the power to fine or imprison for a time certain is abandoned. There has been no instance of the exercise of such power by that House since the Restoration, and the cases previously are generally regarded as instances of excess of jurisdiction(*c*).

(*a*) Report to the House of Commons, 1771, cited 8 State Trials, 65.

(*b*) Hatsell, App. No. 6

(*c*) Lord Mansfield, referring to the case of the town of Westbury, men-

The House of Lords has however repeatedly exercised the power of fining and imprisoning beyond the duration of the session. The latter power has been very recently exercised.

The precedents on this subject are however considered by a very learned writer, who has carefully examined them, to be neither ancient nor unquestioned. He observes that the power thus assumed by the House of Lords clashes with the fundamental rights of the people of having trial by jury, and the administration of justice in regular legal course; that the assumed power has been sanctioned neither by statute, nor by the House of Commons, nor by any judicial decision; but that the power is so far sanctioned by usage now, that probably the judges would not, on proceedings of *habeas corpus,* relieve against it(*a*).

Occasionally—in cases of alleged libel—the Houses of Parliament, instead of exercising their summary jurisdiction, have adopted a course not liable to the same constitutional objections, viz. that of instituting prosecutions at law. In some cases the Houses have addressed the Crown, praying that the Attorney-General might be directed to institute such proceedings; and in other cases have, on their own authority, directed the Attorney-General to prosecute. Thus, in 1763, Wilkes was prosecuted at law, upon a joint address of the two Houses of Parliament, for a seditious libel in the 'North Briton,' No. 45, and was

tioned in a former part of this chapter to have been fined for selling the right to represent the borough, said there must be an error in the statement that the House of Commons imposed a fine, as that House had no such power. (R. *v.* Pitt, Burrows's Reports, 1336.) Lord Chief Justice Denman also, in Stockdale *v.* Hansard (9 Adolphus and Ellis, 114), treats it as clear that the House of Commons has no such power.

(*a*) Judicial Arguments and Collections, by Francis Hargrave, 1797, vol. i. p. 1, Cases of Bond and Butler; vol. ii. p. 133, Perry's Case.

The difference between the powers of the Houses of Parliament as to fining and imprisoning, has been sometimes explained on the ground that the House of Lords has the power in question as incident to a Court of Record, but that the House of Commons is not a Court of Record. Mr. Hargrave however disputes the validity of this argument.

condemned to fines and imprisonment(*a*). Such trials have, however, sometimes resulted in acquittals, as in the cases of John Stockdale, for a libel on the House of Commons, in 1789, and John Reeves, for a libel in his pamphlet on the English Constitution, in 1796(*b*). These cases are remarkable, as instances of decisions of the House of Commons being virtually reversed by the verdicts of juries.

(*a*) 19 State Trials, 1075.
(*b*) 22 State Trials, 238; 26 State Trials, 237.

CHAPTER X.

THE PRIVY COUNCIL AND CABINET COUNCIL.

THE English Sovereigns have, from ancient times, had various councils to assist and advise them in the exercise of the Royal prerogatives. Besides certain councils which have been on a few occasions specially appointed by Parliament, there are others of a more regular kind, which anciently belonged to the Crown in virtue of its prerogatives. These are variously enumerated by different authorities. Blackstone(*a*), following Coke, enumerates four, viz. Parliament; the peers of the realm, who have in some cases, since the constitution of the Houses of Parliament, been convened as a separate council; the judges for matters of law; and the Privy Council. Sir Matthew Hale(*b*) enumerates the following four kinds of councils: the *Consilium Privatum et Assiduum,* now commonly called the Privy Council; the *Consilium Ordinarium,* which consisted of the Privy Council and certain great officers of state, judges, and others; *Magnum Consilium,* or the Lords Spiritual and Temporal, to which council the Concilium Ordinarium was annexed; *Commune Consilium,* or both Houses of Parliament.

These councils have fallen into disuse, except Parliament and the Privy Council.

Under the Norman Kings, the public assemblies of the

(*a*) 1 Commentaries, ch. 5.

(*b*) Hale, 'Jurisdiction of the Lords' House of Parliament,' ch. 2.

kingdom were distinguished by the appellations, Concilium, Magnum Concilium, and Commune Concilium. Of these, the first was the King's ordinary council, consisting of persons selected by himself, and assisted by the Chief Justiciar, Chancellor, and Judges, and other officers of state. It was not only a council of state, but the supreme court of justice (Curia Regis), and met at several periods of the year. The Magnum Concilium was a larger assembly, convened on extraordinary occasions, and comprised the principal persons of rank and property in the kingdom. The Commune Concilium was the supreme legislative assembly. The Commune Concilium of the Charter of John is there mentioned with reference only to the imposition of scutages and aids, and depended solely on tenure in chief of the Crown(*a*).

At the close of the reign of Henry III., the Curia Regis was called the King's Parliament—a term then employed to express any assembly met for purposes of conference; and the assembly is supposed to have possessed the powers of the four Courts of Chancery, King's Bench, Common Pleas, and Exchequer.

The King's ordinary council assisted him in the exercise of his Royal prerogative, and gave a sanction to his acts. He had a limited prerogative to make laws on his own authority, but beyond certain limits the consent of a larger assembly, the Magnum or Commune Concilium, was necessary(*b*).

The constitution and functions of these various councils are not, however, precisely defined in ancient records. It is obvious that in the disturbed and arbitrary reigns of many of the successors of the Conqueror, there must have been much irregularity in the exercise of the powers of these assemblies.

It has already been noticed, that before the constitution

(*a*) Report on the Dignity of a Peer, pp. 20, 22; Parry's 'Parliaments,' Introduction.

(*b*) Report on the Dignity of a Peer, *ibid.*; Parry's 'Parliaments,' x. xi.

of the two Houses of Parliament, a large legislative power belonged to the King in council. It is clear that throughout the thirteenth century the Privy Councillors had a large share in making laws in Parliament. The Lords in Parliament are said by Sir Matthew Hale(a), to have made up with the ordinary council the great court of Parliament about the time of Edward I., and Hale observes, that in that reign, the Concilium Regis, great officers, and judges gave their consents and suffrages in Parliament. This opinion has been controverted by a learned writer(b), but on reference to the statutes of Edward I., it is apparent that many of them were made by consultation between the Lords and members of the King's ordinary council. Several instances of statutes so made are cited in the note subjoined(c); and from these and other instances which might be cited, it is apparent, that in the thirteenth century the King's council had large legislative powers, and that those powers were exercised sometimes independently of, and sometimes by consultation with, the legislative assembly of the kingdom.

(a) 'Jurisdiction of the Lords' House of Parliament,' ch. 14

(b) Macqueen, 'Appellate Jurisdiction,' 674.

(c) The Statute of Westminster the first (A.D. 1275), 3 Edw. I., is made by the King, by his Council, *and* by the assent of the prelates, peers, and commonalty (*par son conseil et par lassentement des et Ercesvesques, Evesques, Abbes, Priours, Countes, Barons et la comminalte de la terre*). The Statute of Bigamy (as it is called), 4 Edw. I. stat. 3, A.D. 1276, begins thus (in the translation):—"In the presence of certain reverend fathers, bishops of England, and others of the Council of the kingdom of England, the constitutions underwritten were recited, and after heard and published before the King and his Council, for as much as all the King's Council, as well justices as others, did agree that they should be put in writing for a perpetual memory;" and the statute concludes by stating that these constitutions were made in Parliament. The important Statute of Gloucester, A.D. 1278, is stated in the subsequent Statute of Westminster the second (13 Edw. I. stat. 1), to have been ordained by the King, calling together the prelates, earls, barons, *and his Council*, at Gloucester. The statute Articuli super Chartas, 28 Edw. I. stat. 3, is expressed to be made at the request of the prelates, earls, and barons; and concludes with the proviso—"the King and his Council, and all they that were present at the making of this ordinance, will and intend that the right and prerogative of his Crown shall be saved to him in all things."

In this century, even before the constitution of the House of Commons, A.D. 1265, we find the barons on several occasions exercising a control over the King's ministers and advisers. Thus in 17 Hen. III., A.D. 1233, the earls and barons refused to attend Parliament, and threatened to elect a new King, unless the King dismissed the Bishop of Winchester, who had been appointed chancellor for life, and other councillors from his court. In Parliament, in the next year, the King assented to the demands of the prelates and barons, and dismissed his councillors. In the twenty-second year of the same reign, A.D. 1238, a council is held in London which the *Magnates* attend in arms, and after long debates, the King takes an oath to be governed by a certain number of "grave men," to be appointed for the purpose. In 28 Hen. III., A.D. 1244, another great council of prelates and barons is held, and a committee is appointed to draw up certain articles for the regulation of the King's conduct, and the nomination of his chief ministers. So again in 1249, at a council at London, the Magnates insist on the appointment of certain officers, the justiciar, chancellor, and treasurer, by their advice. In 1255 this demand is again made with the addition that those officers shall not be removable without the concurrence of the common council of the realm(*a*). In 1258, at the Parliament at Oxford, an arrangement was made as to the King's council which almost deprived him of his regal power. The King and barons respectively elected twelve persons, to form together a committee, who had in effect the power of nominating the King's council, to whom the government of the kingdom was committed. This committee also provided that the chief justiciar, chancellor, treasurer, and other officers should be nominated by them yearly(*b*).

(*a*) Parry's 'Parliaments,' under the respective dates; 'Revolutions in English History,' by Robert Vaughan, D.D., London, 8vo, 1859, vol. i. p. 495.

(*b*) Parry's 'Parliaments,' 38.

In the following century (the fourteenth), we find frequent instances of Parliamentary control of the advisers of the Crown. One of the earliest(*a*) instances of Parliamentary proceedings against ministers of the Crown, after the establishment of the two Houses of Parliament, was that of Piers Gaveston. In 35 Edw. I., A.D. 1307, the King had, at the instance of Parliament, banished Gaveston on account of the familiarity of the Prince, afterwards Edward II., with him. He was recalled by Edward II. after his accession, and in the fifth year of that reign, A.D. 1312, "by the examination of prelates, earls, barons, knights, and other good people of the realm, it was found that Piers de Gaveston had evilly counselled the King," and had been guilty of other offences, including encroachment on the Royal authority in making alliances, obtaining Royal grants for his own benefit, and unlawfully using the Great Seal; and it was ordained that he should be exiled for ever(*b*).

A few years later, we have another instance of the interposition of Parliament in the nomination of the King's council. In 1316, 9 Edw. II., the Earl of Lancaster was appointed by the authority of Parliament to be president of the council, and accepted the office on the terms that "no acts touching the kingdom should be done without the advice of the council, and any member of the council who should either do any act or give any advice prejudicial to the kingdom should be removed at the next Parliament"(*c*).

At the Parliament at York in 13 Edw. II., A.D. 1320, it was agreed that Hugh le Despencer the younger should be chamberlain, and that certain prelates, and other great men should be with the King by turns, at several seasons of the year, the better to advise him, without whom no

(*a*) In 33 Edw. I., A.D. 1305, proceedings are taken against Nicholas de Segrave, a baron high in confidence, and having the command in Scotland, and judgment is given against him before the King, earls, barons, magnates, and others of the Council. (Parry's 'Parliaments,' 66.)

(*b*) 1 State Trials, 22.

(*c*) Parry's 'Parliaments,' 80.

great business should pass; and Hugh le Despencer the elder was excluded from the King's council. Shortly afterwards, in the same year, the Despencers, who had gone beyond the seas, were accused of giving evil counsels to the King, of excluding the great men of the realm, and good counsellors from advising with the King, and of usurpation of the Royal power. These charges are recorded in an "award" made in Parliament, by which the peers of the land, earls, and barons, in the presence of the King, awarded that Hugh le Despencer the father, and Hugh le Despencer the son, should be banished(*a*). A statute, 15 Edw. II., was passed to that effect, which appears to be the earliest instance of a bill of pains and penalties(*b*).

About the period just referred to, a considerable change was effected in the powers of the King's select Council. In a previous chapter(*c*), we have referred to the recognition in the fifteenth year of Edw. II., A.D. 1322, of the constitutional principle, that the legislative authority belonged only to the King, Lords, and Commons, assembled in Parliament. From that time the power of the Council became greatly curtailed, and its functions became principally consultative, and so they continued limited until the end of the Plantagenet dynasty. Nearly up to the accession of Edw. III., A.D. 1327, the select Council seems to have had a large share in the business of Parliament, and the "Curia Regis" generally consisted of a selected council (distinguished from the prelates, earls, and barons, assembled in Parliament), and of which the Chief Justiciar, Chancellor, and Judges, formed a part. This selected Council, when assembled in Parliament, administered justice by way of both original

(*a*) 1 State Trials, 23.

(*b*) In the next year, 1322, an Act was passed revoking the sentence of banishment for various reasons, one of which was that the award was made in the absence of the accused, and contrary to the Great Charter, which says that "no freeman should be banished or otherwise destroyed but by lawful judgment of his peers." The annulment of the exile of the Despencers was repealed by 1 Edw. II. c. 2, and this repealing statute was itself repealed in 21 Ric. II., on the petition of Thomas le Despencer. (1 State Trials, 38.)

(*c*) *Ante*, ch. 3.

and appellate jurisdiction. A part of this jurisdiction is now vested in the Lords. When this jurisdiction ceased to be exercised by the sworn council of the King, and the part which now remains was transferred to the Lords, has not been discovered, but the first evidence of the transfer appears in the rolls of 1 Edw. III.(*a*).

Sir Matthew Hale considers that the right of the Privy Council to give their consents and suffrages in Parliament continued till after the time of Edward I., and that about the time of Richard II. the great officers and judges began to be merely assistants or advisers; and the authoritative and judiciary powers vested in the Lords' House. He considers that the "figure and model" of the *concilium Regis*, as thus constituted, are preserved in that House to this day: for thither are summoned the great officers, and most, if not all, of the Privy Council; but they are distinguished from the Lords by the form of their summons, the places where they sit, and the extent of their power(*b*).

(*a*) First Report on the Dignity of a Peer, p. 296.

(*b*) Hale's 'Jurisdiction of Lords' House of Parliament,' ch. 9, 14. See to the same effect the first Report on the Dignity of a Peer, 21.

That at the end of the fourteenth century the Council was regarded as a consultative body, but subordinate to Parliament in its legislative capacity, appears from the articles of accusation against Richard II., preferred in Parliament on the accession of Henry IV., A.D. 1399. One of the articles charges Richard with assuming a legislative power, and another charges him with dispensing with statutes, in contravention of his coronation-oath. The twenty-third article is as follows:—"In most of the great Royal Councils, when the lords of the realm, the judges and others being charged that they would faithfully counsel the King in matters relating to his state and that of his kingdom, the said lords, justices, and others, very often in giving counsel, according to their best discretion, have been by the King suddenly and so fiercely chidden and reproved that they have not dared to speak the truth in giving their advice for the state and kingdom." (1 State Trials, 135.)

Referring to the history of the King's Council in the fourteenth and fifteenth centuries, Sir Harris Nicolas observes, that "its proceedings exhibit an extraordinary combination of the executive and legislative functions of government." ('Proceedings and Ordinances of the Privy Council,' preface). Sir Francis Palgrave, referring to nearly the same period, says, "that statutes were framed by this Council and brought into Parliament, and all Parliamentary Petitions were addressed generally to this Council conjointly with the King." ('Essay upon the original Authority of the King's Council,' p. 21.)

An important change in the constitution of the council took place in the reign of Edward III., by the introduction of laymen into the principal offices of the state. In 45 Edw. III., A.D. 1371, the Commons in a petition state that it had been declared to the King by all the Earls, Barons, and Commons, in the late Parliament, that the government had for a long time been managed by men of the church, to the great prejudice of the kingdom, and they pray that laymen of sufficient abilities, and no others, may for the future be made Chancellor, Treasurer, and other great officers. The King answers, "he would do what seemed best to him, by advice of his council," and shortly afterwards appoints a lay Chancellor and a lay Treasurer in the places of two prelates(*a*).

In the latter part of the fourteenth century we find the first records of impeachments, in which the House of Commons took upon themselves the office of accusers. One of the earliest, if not the earliest, instance of impeachment by the Commons is that of the proceedings against William Latimer and others for misdealings with the public revenue, in 50 Edw. III., A.D. 1376. The Record states, that Latimer was impeached and accused by the voice of the Commons (*empecher et accuser per clamour des dits communes*). He was condemned by the Lords in full Parliament to fine and imprisonment; and thereupon, the King, at the request of the Commons, banished him for ever from his council(*b*).

The proceedings, shortly afterwards, in the case of Michael de la Pole, Earl of Suffolk, and other Privy Councillors, are very instructive as to the constitutional powers of the King's advisers at that time. These proceedings in 10 Ric. II., A.D. 1386, originated in the complaints of the Peers and Commons, and the request of the nobles that the King would hold a Parliament for the purpose of redressing their grievances. A Parliament was accordingly held, at which the Treasurer and the Chancellor De la Pole, were dismissed from their offices, and the latter was forth-

(*a*) Parry's 'Parliaments,' 132. (*b*) 4 Hatsell's 'Precedents,' 57.

with impeached by the Commons of malversation and other offences. At the previous Parliament, nine Lords had been assigned to view and examine the state of the King and realm, and to deliver their advice how the same might be improved and amended, and the Chancellor promised in full Parliament that such advice should be put in due execution. One of the articles of accusation against him was, that this promise was broken by his default, he being the principal officer and minister. With respect, however, to the charges which related to his conduct as a minister and one of the King's council, it seemed to the King and the Lords of Parliament, that he ought not to be impeached by himself, without his companions, who were then of the King's council(*a*). The other charges were for procuring grants from the Crown improperly, and causing a tax which had been granted by the Commons to be expended according to a certain form to be expended in another manner, so that the sea was not guarded as it ought to have been. De la Pole was convicted upon some of the articles, and condemned to fine and imprisonment. It is related that all these articles were so fully proved, that the Earl could not deny them; insomuch that when he stood upon his defence, he had nothing to say for himself; whereupon the King, blushing for him, shook his head, and said, "Alas, alas, Michael, see what thou hast done."

Neither did the Parliament stop here, but to provide further for the whole State, they, by the unanimous consent of the King, prelates, barons, and commons, constituted certain commissioners, with plenary powers for ordering and disposing of the public affairs as to them should seem best. The King's commission recites that the King had, at the request of his Lords and Commons, changed the great officers of the Crown, and had appointed eleven commissioners therein named, to be his great and continual council for one year next ensuing, with power to examine the government, receive the revenue, to do what they would in the

(*a*) 6 Hatsell, 58.

kingdom, and amend all things according to their discretion. This Parliament, it may be observed was held in the tenth year of the King's reign, and the twentieth of his age.

Soon after, A.D. 1387, Michael de la Pole, and his confederates, "being moved with implacable fury against the late statute, buzzed into the King's ears, that the statutes lately enacted were very prejudicial to the honour of the Crown, and derogatory to the princely prerogative." De la Pole obtained from the judges answers(*a*) condemnatory of the decision of Parliament against him, and procured his own release from imprisonment. A large party of the nobles mustered their troops to support their commissioners, and resist De la Pole. At another Parliament(*b*), held Feb. 3, 1388, De la Pole, and four others of the King's former counsellors were accused of high treason by five noblemen "appellants," who declared their appellation by the mouth of Robert Pleasington, their Speaker. The articles of impeachment, containing charges of encroachment on the Royal power, excluding good counsellors from the King's presence, malversation, and violent resistance to the authority of Parliament, were then read, and the Lords appellants undertook to prove them. De la Pole and three others of the accused had fled, and after due summons were attainted by statute(*c*). Sir Nicholas Brambre, Mayor of London, the only one of the accused who was in custody, was brought into Parliament to be tried. He desired to fight in the lists to maintain his innocency. "The appellants, hearing this courageous challenge, with resolute countenance answered that they would accept of the combat, and thereupon flung down

(*a*) These answers are recited in a later statute, 21 Ric. II. c. 2. For these answers all the judges who gave them (except the Chief Justice, who had been executed upon another charge) were impeached by the Commons, and found guilty of treason, in 1388, and banished. (1 State Trials, 119; 4 Hatsell, 59.)

(*b*) It was called by some historians "the Parliament that wrought wonders," by others, "the merciless Parliament." (Parry's 'Parliaments,' 152.)

(*c*) 11 Ric. I. c. 1. This seems to be the earliest Act of Attainder in the Statute Book.

their gages before the King; and on a sudden the whole company of Lords, Knights, Esquires, and Commons, flung down their gages so thick that they seemed like snow in a winter's day, crying out, 'We also will accept of the combat, and will prove these articles to be true to thy head, most damnable traitor.' But the Lords resolved that battle did not lie in that case; and that they would examine the articles touching the said Nicholas, and take the information by all true, necessary, and convenient ways, that their consciences might be truly directed what judgment to give in this case to the honour of God, the advantage and profit of the King and his kingdom, and as they would answer it before God, according to the course and law of Parliament." Brambre was convicted and hanged(*a*).

The instance cited serves to show that though in the reign of Ric. II., the Commons had assumed to themselves the office of accusers in impeachments, the office was sometimes performed by others. At a later period of the same reign, A.D. 1397, the articles of impeachment against the Duke of Gloucester and others were brought against them by Lords appellants. But two years afterwards, on the accession of Henry IV., all these appeals(*b*) in Parliament were taken away by statute, 1 Hen. IV. c. 14. The effect of that statute was to prevent impeachments from being preferred in the Lords' House by any Lord or private person; but impeachments by the House of Commons were not affected by that statute(*c*).

The statutes of the fourteenth century do not throw

(*a*) 1 State Trials, 89. The sentence against Michael de la Pole was, after his death, reversed by statute, 21 Ric. II. c. 12 and 13, in accordance with the decisions of the judges in 11 Ric. II., that the judgment against him in Parliament was erroneous.

(*b*) The word "appeal" in this statute is not used in its modern sense of a suit carried from an inferior court to a superior, but signifies a criminal prosecution by a private subject. (4 Blackstone, 312.)

(*c*) So decided by the judges on the occasion of articles of impeachment being prepared by the Earl of Bristol against the Earl of Clarendon, A.D. 1663. (Hale, 'Pleas of the Crown,' vol. ii. c. 20, p. 149, ed. 1800, by Dogherty.)

much light upon the constitution of the King's council; the general tenor of these statutes(*a*) serves however to show that the council was then principally an administrative body; that with respect to a few specified offences, Parliament gave to the council a power of judicature(*b*), but expressly prohibited the council from exercising a general criminal jurisdiction; and that the council had already attempted to exercise such a jurisdiction notwithstanding the prohibition. Another duty which Parliament assigned to the Privy Council, was that of seeing that the ordinary course of justice was not hindered by the attempts of powerful persons to unduly influence the judges.

From the commencement of the fifteenth century, the House of Commons have always been the accusers in Parliamentary impeachments, though Parliamentary inquiries into the misconduct of ministers of the Crown were not always conducted according to the regular course of impeachments. Thus the proceedings against Beaufort, Bishop of Winchester, 4 Henry VI., A.D. 1426, originated in a charge of the Duke of Gloucester against the Bishop, con-

(*a*) By 9 Edw. III. stat. 2, c. 7, exchanges of money are to be established at various places, as the King and council may appoint. By 14 Edw. III. stat. 1, c. 14, delays of judgments in other courts may be redressed in Parliament, with the advice of certain of the King's council. By 25 Edw. III. stat. 5, c. 4, no man is to be judged on suggestion or petition to the King or his council, but according to law. 42 Edw. III. c. 3 is to the same effect, and recites that persons have been wrongfully summoned before the council. By 12 Ric. II. c. 11, *scandalum magnatum* may be tried and punished by the council. By 20 Edw. III. c. 1, the justices are to report to the council any unlawful commandments to them to withhold justice. By 16 Ric. II. c. 5, the offence of bringing in Papal bulls is to be tried by the council. By 21 Ric. II. c. 6, descendants of persons attainted in Parliament are excluded from the council. By 1 Hen. IV. c. 13, the officers of customs and subsidies are to be under the governance of the Treasurer, with the assent of the council.

(*b*) Blackstone thinks that the council referred to in the statute 16 Ric. II. c. 5, above cited, consisted of the King's judges. (1 Commentaries, 229.) But Mr. Justice Coleridge, in his note on the passage, doubts this, and thinks that the Council here meant was a court of equitable jurisdiction, from which the courts of Chancery and Star Chamber were in process of time derived.

tained in written articles, which, with the answers thereto, were delivered to Parliament(*a*).

The proceedings in 28 Henry VI., A.D. 1451, against De la Pole, Earl of Suffolk, and grandson of the De la Pole before mentioned, curiously illustrate the diversities which then existed in the practice of Parliamentary impeachments. De la Pole, who was then virtually prime minister, was accused by articles presented to the Lords by the Commons, and communicated to the King at the request of the latter. Among the charges were malversation, advising the King to make improper grants, discovering the King's secrets to the French, and the making a convention of peace without the assent of the Privy Council. The Chancellor, by the King's command, pronounced sentence of banishment for five years; after which sentence the Lords required "that it might be enrolled that the said judgment was by the King's command, and not by their assent;" and also required that neither they nor their heirs should by this example be barred of their peerage and privileges(*b*).

In the long and feeble reign of Henry VI. many other complaints were made by the Commons against the King's council. For example, in 1451, they petitioned the King that the Duke of Somerset and several others should be removed for ever from his councils, and the King partially complied with their request(*c*). Again, in 32 Henry VI., A.D. 1453, after the appointment of the Duke of York to be the King's lieutenant, the Commons petition for the appointment of "a wise council of the right discreet and wise lords and others."

From this time the control of Parliament over the King's council was, for a long period, suspended. Throughout the reigns of all the Tudor dynasty, and until the reign of James I., no cases of impeachment by the House of Commons occur(*d*). That most powerful instrument of restraint of the

(*a*) 1 State Trials, 267. (*b*) *Ibid.* 271; 4 Hatsell's 'Precedents,' 66.
(*c*) 3 Hume's Hist. of England, 196.
(*d*) The Parliamentary proceedings against Cardinal Wolsey, in 1529, are

King's ministers ceased to be exercised, and by usurpation and the statutory extension of the jurisdiction of the Star Chamber, the council obtained an enormous increase of its judicial and legislative powers.

Mr. Hatsell(*a*) attributes this cessation of impeachments to two causes,—the transfer to the jurisdiction of the Star Chamber of many offences which hitherto had been the subjects of Parliamentary impeachment, and the prosecution of treasons by bills of attainder(*b*). To these causes a third must be added,—the subserviency of Parliament; for without the House of Commons had given up the practice of prosecuting state crimes, the existence of other modes of punishing some of those crimes would not of itself account for the cessation of impeachments.

The Star Chamber was a committee of the Privy Council. In the third year of Henry VII. an Act was passed, 3 Hen. VII. c. 1, giving new powers to that tribunal, though the statute does not designate it by its name of "Star Chamber." The statute recites that by unlawful maintenance, etc., "untrue demeanings of sheriffs in making of panels and other undue returns, by taking of money by juries, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued." It is provided that the Chancellor, Treasurer, Keeper of the Privy

no exception to this remark, for those proceedings originated in the House of Lords; but the articles of accusation are instructive, as they relate to his conduct as minister and responsible adviser of the Crown. He was accused *inter alia* of making treaties, and having conferences with ambassadors, and diplomatic correspondence, without the knowledge of the King or the council; and in the council, "if any man would show his mind according to his duty, contrary to the opinion of the said Cardinal, he would so take him up with his accustomable words, so that they were better to hold their peace than to speak." (1 State Trials, 867.) These articles were prepared obviously from subserviency to the King. They were sent down by the Lords to the Commons, and there rejected. "Thomas Cromwell so wittily defended the Cardinal, his master, that no treason could be laid to his charge."

(*a*) 4 Hatsell's 'Precedents,' 72.

(*b*) These are considered in the chapter of the second book relating to Judicature in Parliament.

Seal, or two of them, calling to them a bishop and a temporal lord of the council and two justices, may inquire into charges of such offences, upon bill or information put to the Chancellor. The tribunal is empowered to call before them the persons accused, to take evidence, and "to punish them after their demerits, after the form and effect of statutes thereof made in like manner and form as they should and ought to be punished, as if they were thereof convict after the due order of the law"(*a*).

The powers of the Star Chamber were greatly enlarged by the statute in question, but that Court existed at a much earlier period, and was one of the most ancient courts of criminal jurisdiction in the kingdom(*b*). Bacon, in his History of Henry VII., eulogizes the Star Chamber, on the ground that "as the Chancery had the prætorian power for equity, so the Star Chamber had the censorian power for offences under the degree of capital"(*c*); that is, he regards the Star Chamber in its criminal jurisdiction (for it had also a civil jurisdiction) as a court of criminal equity. But this idea of a criminal equity, or system of criminal jurisprudence corrective of, or supplementary to, the common law, is certainly repugnant to the principles of our law; and the constitution of the Star Chamber had an inherent vice,—the union of judicial and administrative power,—which, as was shown in a previous chapter, is incompatible with the pure administration of justice(*d*).

Of the origin and powers of the Star Chamber, a great constitutional authority, Lord Somers, thus wrote:—"We had a Privy Council in England, with great and mixed

(*a*) By 21 Hen. VIII. c. 20; the President of the Council was added to the other judges of the Star Chamber.

(*b*) Coke, 4 Inst. ch. 5. In a treatise on the Star Chamber, by Sir Thomas Mallet, cited 17 State Trials, 758, it is said that this court was probably the most ancient of any court of justice, and the mother court of the kingdom.

(*c*) History of Henry VII.; works edited by Spedding, Ellis, and Heath, vol. vi., p. 85.

(*d*) *Ante*, ch. 1.

power; we suffered under it long and much. All the Rolls of Parliament are full of complaints and remedies, but none of them effectual till Charles the First's time. The Star Chamber was but a spawn of our council, and was called so only because it sat in the usual council chamber. It was set up as a formal court in 3 Henry VII., in very soft words; to punish great riots, to restrain offenders too big for ordinary justice, or, in the modern phrase, to preserve the public peace; but in a little time it made the nation tremble. The Privy Council came at last to make laws by proclamation, and the Star Chamber ruined those that would not obey. At last they both fell together (*a*).

In reference to the power of the Privy Council in the time of Henry VIII., the reader's attention is recalled to the statutes of that reign, giving a legislative power to the King's proclamations (*b*).

A learned writer has considered that the Privy Council obtained its great power during the reigns of Henry VIII. and Elizabeth, by the long intermission of Parliaments in those reigns, and that Elizabeth conducted her Government almost wholly through the Privy Council, and regarded Parliament merely as an instrument of taxation (*c*). This opinion must however be received with some qualification with respect to both reigns. There were only two considerable intermissions of Parliament in the reign of Henry VIII., and the sessions were longer than in former reigns. During the last seventeen years of Henry VIII., Parliament met annually, and often had more than one session in a year. In the reign of Elizabeth, the intermissions of Parliament were more frequent. She reigned forty-three years, and in twenty of those years there were sittings of Parliament (*d*). In the frequent disputes between the Crown and the Par-

(*a*) Minutes of Lord Somers's Speech in the House of Lords on the Bill for abolishing the Privy Council of Scotland; 2 Lord Hardwicke's Miscellaneous State Papers, 474.

(*b*) *Ante*, p. 23.

(*c*) Macqueen, 'Appellate Jurisdiction,' p. 680.

(*d*) See Parry's 'Parliaments,' lx.

liament, the authority of the latter was often successfully maintained. Thus, in 8 Eliz., a dispute arose upon a commandment of the Queen to the Commons not to proceed upon a petition for her marriage. The Commons take into consideration a motion whether the Queen's commandment is not against their liberties; and the Queen sends a command that they shall desist from the debate, "and if any person is not satisfied, but had reasons, let him come before the Privy Council, there to show them." But a week afterwards, "Mr. Speaker declares her Highness's pleasure to revoke her two former commandments, which revocation is taken of the House most joyfully"(*a*).

There is no doubt, however, that Elizabeth and her advisers attempted to render Parliament subordinate to the Privy Council. Thus, in 13 Eliz., when the Commons present their Speaker, the Lord Keeper tells them that they "will do well to meddle with no matters of state *but such as shall be propounded to them*, and to occupy themselves in other matters concerning the commonwealth." This Parliament also was dissolved, after a speech from the Queen condemning their meddling "with matters neither pertaining to them nor within the capacity of their understanding"(*b*). There are many other instances of a similar nature in this reign, which indicate the contest then going on between the Court and the Commons for supreme power.

The following instance very clearly shows the relation which Elizabeth wished to establish between the Privy Council and Parliament, and the relation which actually subsisted. At the end of the session 35 Eliz., the Lord Keeper says that the Queen commended the service and devotion of Parliament, but she misliked "that such irreverence was shewed towards Privy Counsellors, who were not to be accounted as common knights and burgesses of the House, that are counsellors only during the Parliament, whereas the other are standing counsellors, and for their

(*a*) Parry's 'Parliaments,' 216. (*b*) *Ibid.* 217, 222.

wisdom and great service are called Counsellors of the State"(*a*).

The Parliamentary control of the Privy Council, which had been interrupted, as we have seen, in the time of the Tudors, was revived under the next dynasty. After the death of Elizabeth, her successor James I. retained for a time many of her principal advisers in their offices, and during the earlier part of his reign the Council maintained its important function of regularly advising the Crown on matters of state. But in the latter part of this reign the duty of advising the Crown was almost monopolized by favourite ministers, to the exclusion of the rest of the Council. One of the grounds of the impeachment of the Duke of Buckingham by the Commons in 1626, was his plurality of offices in the State in the reigns of James I. and Charles I. The Commons, said Sir Robert Cotton in Parliament, desired that, as the King had wise and worthy servants, he would advise with them together, "and not be led with young and single counsel"(*b*).

These proceedings against the Duke of Buckingham are remarkable as the first instance of resumption, after long disuse, of impeachments of ministers on account of advice to the Crown. Procedure by impeachment had indeed been revived in the reign of James I., but only as a means of punishing corruption and malversation, and it is clear that the revival of impeachments, even for that purpose, was distasteful to the King(*c*). The articles of impeachment of the Duke of Buckingham, delivered by the Commons to the Lords, 2 Car. I., 1626, included a charge of engrossing to

(*a*) Parry's 'Parliaments,' 234. (*b*) 2 State Trials, 1272.

(*c*) The earliest judgment given, in the reign of James I., by the Lords upon an impeachment by the Commons, was against Lord Chancellor Bacon, May 3, 1620. The King, by a message to the Commons, had proposed that the inquiry into the charges against Bacon should be by a commission of six of the Higher House and twelve of the Lower House. But Sir Edward Coke advised the Commons to "take heed the commission do not hinder the manner of our Parliamentary proceeding;" and this advice was followed. (2 State Trials, 1094.)

himself several offices in the State, "with exorbitant ambition, and for his own profit and advantage;" of neglecting his duty, as Great Admiral of the Kingdom, of guarding the seas; of selling places of judicature; and of exhausting and misemploying the King's revenue. The Commons voted a remonstrance to the King, for the purpose of obtaining the removal of the Duke from his offices and from the King's councils. The King, Charles I., opposed the proceedings against Buckingham, and at length stopped them by a sudden dissolution of Parliament. Shortly afterwards, Buckingham was assassinated (*a*).

The latter part of the reign of Charles I. was full of events of importance in the history of the Privy Council. The enormous powers which that body had obtained in the Star Chamber, were destroyed in 1640, by the Act abolishing that court (*b*). The recitals of the Act are the most authentic records of the oppressiveness of their jurisdiction. They state that the judges of the court have exceeded their statutory powers, and have made decrees and inflicted punishments not warranted by law; that the reasons for erecting and continuing that court have ceased; that its proceedings have introduced arbitrary government; that the council table have of late assumed a power to meddle in civil causes and matters of private interest only, contrary to law. The statute provides for the total extinction of the powers of the court and some local courts of like jurisdiction, and prohibits the erection of any such courts hereafter.

Of *Cabinet Councils*, that is, councils held apart from the rest of the Privy Council, by those members of that body who are the principal advisers of the Crown, we find the first mention *eo nomine* in the reign of Charles I.—though it is clear that at every period of the history of the Privy Council the Sovereigns have been accustomed to select some of its members as their principal advisers. Clarendon (*c*), referring to the period of the Earl of Strafford's

(*a*) 2 State Trials, 1267.
(*b*) 16 Car. I., c. 10.
(*c*) Hist. of the Rebellion, vol. i. book 3.

attainder, A.D. 1640-41, says that the practice then prevailed of admitting many persons, who were of inferior abilities, into the Privy Council, merely as an honorary distinction, and that the number of the council thus grew so large, that "for that and other reasons of unaptness and incompetency, committees of dexterous men have been appointed out of the table to do the business of it." He states also, that one of the grounds of the attainder of Strafford was a discourse of his "in the Committee of State, which they called the *Cabinet Council.*" Charles I. gave his consent, that in the proceedings against Strafford, Privy Councillors might be examined upon oath upon such matters as had passed at the council table; for without the King's consent, the members of the council were restrained by their oath from revealing what passed there. Clarendon remarks on the consequences of the consent thus given, observing that "it was matter of horror to the counsellors to find that they might be arraigned for every rash, every inconsiderate, every imperious expression or word they had used there; and so made them more engaged to servile applications. It banished for ever all future freedom from the board, and those persons from whom his Majesty was to expect advice in his greatest straits; all men satisfying themselves that they were no more obliged to declare their opinions there freely, when they might be impeached in another place for so doing"(*a*).

In the "humble petition and advice of both Houses of Parliament, with nineteen propositions and the conclusion," sent to Charles I. in 1642, the first proposition was, that none should be members of the Privy Council except such persons as were approved of by both Houses. In the second proposition, it was asked that no public Act concerning

(*a*) Clarendon had not always the same objection to revelations of the transactions of the Council. Some of the articles of impeachment exhibited against Lord Clarendon, in 1667, were grounded on his advice to the King in council. In his "Vindication," he stated the nature of the discussions which took place in the council when this advice was given. (6 State Trials, 393.)

the affairs of the kingdom, proper for the Privy Council, should be esteemed of any validity as proceeding from Royal authority, unless done by the advice and consent of the major part of the council, *attested under their hands;* and that the council should be limited to a certain number, not exceeding twenty-five nor under fifteen. In the answer to these propositions, Charles said that he would not consent to displace any of his advisers, simply because they agreed not to votes or bills in Parliament; that the effect of the second proposition was to take from him his regality and give it to the new councillors, and to leave him no more than a single vote with them in the council(*a*). It cannot be disputed, that if these proposals had been carried out, the fundamental constitution of the kingdom would have been changed, and that by the Parliamentary power of appointing the Privy Council, and the regulation that the authority of the King in council should be given to the majority of the council, the executive power would have been in a great measure transferred to the legislative bodies.

Immediately after the Restoration, A.D. 1660, the Privy Council was re-established, and out of them were chosen a Committee of Foreign Affairs; but this committee transacted no business of moment without referring it to the Council Board. It appears that at this time the doctrine of political union among members of the council was not established, for many new members were brought into it who were opposed in judgment and principles as to affairs of Church and State to the King's earlier advisers(*b*).

In 1679, Charles II., by the advice of Sir William Temple, constituted the Privy Council upon a new plan(*c*). The council was limited to thirty persons, of whom fifteen were

(*a*) 1 Clarendon, Hist. of the Rebellion, book 7.

(*b*) See the petition of Lord Clarendon to the House of Lords, 1667; 6 State Trials, 376.

(*c*) It has been erroneously stated that the constitution of Cabinet Councils was due to Sir William Temple ('Encyclopædia Metropolitana,' vol. ii. p. 809, art. "Law," ed. 1845); but the references in the text show that there were Cabinet Councils in the reign of Charles I.

to be chief officers of the Crown, and those were to be councillors *virtute officii*. The other fifteen were to be ten Lords and five Commons, chosen by the King, from among men of character detached from the Court, or who possessed the chief credit in both Houses(*a*). It was supposed that the councillors *ex officio* would adhere to the King, and in case of extremity oppose the exorbitancies of faction. The experiment was tried, and at first seemed to give satisfaction to the public. Four of the members of the new body formed, says Hume(*b*), "a kind of cabinet council, from which all affairs received their first digestion." The ancient office of the Lord President of the Council was revived in the person of the Earl of Shaftesbury(*c*). The introduction of Shaftesbury and the members of the council who were opposed to the Court, soon led to dissension and the abandonment of the new plan.

The Bill of Rights enacted on the accession of William and Mary made no provisions with respect to the Privy Council, but an important regulation with respect to that body was enacted by the Act 12 & 13 Will. III. c. 2, which provided for the succession to the Crown, in case of the death of William III. and of Anne without issue. It was enacted that from and after such succession, "all matters and things which are properly cognizable in the Privy Council by the laws and customs of this Realm shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same." But this clause was before it came into operation repealed by the Act 4 Anne, c. 8, s. 24. Referring to this provision with respect to the signature by Privy Councillors of their resolutions, Hallam observes that "it was endeavoured to restore the ancient principle by this provision in the Act of Settlement, that after the

(*a*) Sir W. Temple's Memoirs, part iii.; Works, vol. i. p. 333, fol. ed. 1720.

(*b*) 8 Hist. of England, 102; Temple's Works, *ibid.* p. 337.

(*c*) By 31 Hen. VIII. c. 10, the Lord President of the Council has precedence next after the Lord Chancellor and Lord Treasurer.

accession of the House of Hanover, all resolutions as to the government should be debated in the Privy Council, and signed by those present; but whether it were that real objections were found to stand in the way of this article, or that ministers shrank from so definite a responsibility, they procured its repeal a very few years afterwards. The plans of the Government are discussed and determined in a Cabinet Council, forming indeed part of the larger body, but unknown to the law by any distinct character or special appointment. I conceive, though I have not the means of tracing the matter clearly, that this change has prodigiously augmented the direct authority of the Secretaries of State, especially as to the interior department, who communicate the King's pleasure, in the first instance, to subordinate officers and magistrates, in cases which, down at least to the time of Charles I., would have been determined in council. But proclamations and orders still emanate, as the law requires, from the Privy Council; and, on some rare occasions, matters of domestic policy have been referred to their advice. It is generally understood, however, that no councillor is to attend except when summoned"(*a*).

Burnet's observation on the repeal of the regulation by which members of the Privy Council were required to sign their resolution is, that it was "impracticable, since it was visible that no man would be a Privy Councillor on those terms"(*b*). But he does not support this conclusion by any argument. The regulation in question would not of itself have made any change as to the responsibility of ministers, but only as to the evidence of it: and even as to the matter of evidence, the statute was not an absolute innovation, but would have merely extended an existing practice of recording in many cases the advice of ministers of state. By ancient practice, documentary or other authentic evidence is preserved of the most important acts of state, and of the concurrence of ministers of the Crown therein.

(*a*) Hallam, 'Constitutional History,' ch. 15, p. 538, quarto ed.
(*b*) Burnet, Hist. of his own Time, A.D. 1705.

Warrants under the Signet and Privy Seal, which are necessary to the performance of many acts of state, would furnish authentic evidence to affect Secretaries of State and Lords Keepers of the Privy Seal(*a*); Treasury Warrants, to affect Lords Treasurers or Commissioners of the Treasury(*b*); and the Great Seal, to affect Lords Chancellors(*c*); and it is manifest that in many other cases the advice of ministers to the Crown can be sufficiently proved by their official acts and surrounding circumstances(*d*).

Upon this subject of the evidences of advice to the Crown, Mr. Hallam observes, that "during the reign of William, this distinction of the Cabinet from the Privy Council, and the exclusion of the latter from all the business of state, became more fully established. This, however, produced a serious consequence as to the responsibility of the advisers of the Crown; and at the very time when the controlling and chastising power of Parliament was most effectually recognized, it was silently eluded by the concealment in which the objects of its inquiry could wrap themselves. Thus in the instance of a treaty which the House of Commons might deem mischievous and dishonourable, the chancellor setting the Great Seal to it would of course be responsible; but it is not so evident that the First Lord of the Treasury or others more immediately advising the Crown on the course of foreign policy could

(*a*) The course of passing instruments under these seals and the Great Seal, was regulated by statute 27 Hen. VIII. c. 11.

(*b*) See as to Treasury Warrants the chapter on Fiscal Administrative Offices, Book III., *infra*.

(*c*) *E.g.* Lord Chancellor Somers was impeached in the reign of William III. for affixing the Great Seal to the Partition Treaty.

(*d*) In the articles of impeachment, the Earl of Oxford (Harley), 3 Geo. I., it will be found that the following kinds of evidence of his advice to the Crown were relied on by the Commons:—Conferences with a secret messenger from the French King; a treaty signed by the Secretaries of State with Oxford's privity; the communication of that treaty, by his advice, to the States General; letters-patent issued pursuant to his counsels; countersignature by him of Royal warrants: a memorial under his own hand to the Crown; reception of a person guilty of high treason as minister from a foreign sovereign, etc. (See State Trials, vol. xv. p. 1052 *et seq.*)

be liable to impeachment, with any prospect of success, for an act in which their participation could not legally be proved"(*a*). To this it may be answered, that though in some cases it might be possible for a minister, by extreme caution, to prevent the existence of any direct evidence of his advice to the Crown, it is probable that in matters of moment, his papers and official acts would generally prove the nature of his counsels. The very case put by Mr. Hallam is exemplified in the instance of the impeachment of the Earl of Oxford. There one of the grounds of accusation against him was his advising a treaty; and the House of Commons appear to have procured ample evidence that the treaty was made by his advice(*b*).

The Cabinet Council, as a branch of the Privy Council, was established in the reign of William III., on much the same principle as in the two or three preceding reigns; that is, it was a committee of the Privy Council in which ministers of different political opinions debated affairs of state. The doctrine of political union in the Cabinet was a later invention. Thus we find that in 1690 the King made some changes in his ministry to give satisfaction to the Jacobite party, so that, as Burnet says, "Whig and Tory were now pretty equally mixed"(*c*). The same thing occurred in the earlier part of Anne's reign. We find the secretary, Harley, in 1707, in the same ministry with his political opponent, the Lord Treasurer Godolphin, "began to set up for himself, and to act no longer under the direction of the Lord Treasurer;" and that the principal part of the Cabinet procured Harley's removal. In 1710, when the Queen was resolved on changing her ministry and having Harley for her chief minister, she dismissed first the secretary, Lord Sunderland, and promised publicly to make no further changes. Two months afterwards, she dismissed the Lord Treasurer Godolphin; and two months after that,

(*a*) 'Constitutional History,' ch. 15, p. 536, quarto ed.
(*b*) 15 State Trials, 1052.
(*c*) Burnet, Hist. of his own Time, A.D. 1690.

she dismissed the Lord Chancellor, Lord President of the Council, and other great officers. This dissolution of the ministry occupied four months; yet Burnet says, "so sudden and so entire a change of the ministry is scarcely to be found in our history"(a).

The history of the practice of simultaneous changes of the whole Cabinet is important with reference to certain political doctrines of party government which have since prevailed. In the troubled reigns of some of the earlier Kings we have seen instances of sudden dismissals of favourites demanded by Parliament; but in these cases the favourites were dismissed, not because of their political opinions, but for gross violations of their duty as executive officers. From the Reformation to the time of Queen Anne, there is no instance of a simultaneous dismissal of all the chief ministers and substitution of their political opponents. The first instance of that kind appears in the reign of George I. On his accession, and immediately after his arrival in England, he effected a simultaneous and total change in all the principal offices under the Crown, but this change was made, not in deference to the wishes of Parliament, but because of the King's strong personal prepossessions against the ministers of the late Queen(b).

With reference to the modern constitution of Cabinets, it is important to trace the origin of the two modern principles of *dependence of the Cabinet upon Parliamentary majorities*,—and of *political unity of the Cabinet*. These two principles may be here considered separately.

The principle that in his political capacity *the King can do no wrong*(c), if we interpret it that whatever is excep-

(a) Burnet, Hist. of his own Time, A.D. 1707, 1710.

(b) Smollett's Hist. of Eng., book ii. ch. 1.

(c) In the speech which Cook, solicitor for the Commonwealth, designed to have delivered if Charles I. had pleaded on his trial in 1649, the maxim that *the King can do no wrong* is examined. The following extract cites some authorities on the subject:—"The case is put in Hen. VII. by a chief judge, That if a King kill a man, it is no felony to make him suffer

tionable in the conduct of public affairs is to be imputed, not to the King personally, but to his responsible advisers(*a*), was only partially established before the Revolution of 1688. After that time the ministers became more dependent than before on Parliamentary support, though in earlier reigns the principle of that dependence was recognized. Speaking of them, Burnet says, "Our Princes used not to dismiss ministers who served them well, unless they were pressed to it by a House of Commons that refused to give them money till they were laid aside"(*b*). In 1700, William III. made some partial changes in his ministry, and gradually discarded the Whigs, and brought the Tories into his service. Some of these changes were partly due to the decline of the Whig interest in Parliament, but not wholly to that cause. The changes were in a great measure instigated by the King's favourites, or by his own personal feelings(*c*). The same remark applies to the changes of ministry in the time of Anne, and at the accession of George I., above mentioned. It is not until the year 1721 that we find a clear instance of a change of ministers effected, not by the wish of the Sovereign, but by the influence of the dominant party in Parliament. In that year ,by the influence of the Whig leaders, who had a large majority in Parliament, an arrangement was made for placing Sir Robert Walpole at the head of

death; that is to be meant in ordinary courts of justice: but there is no doubt but the Parliament might try the King, or appoint others to judge him for it. We find cases in law that the King hath been sued even in civil actions. In 43 Edw. III. 22, it is resolved, That all manner of actions did lie against the King as against any lord; and 24 Edw. III. 23, Wilby, a learned judge, said that there was a writ Præcipe Henrico Regi Angliæ. Indeed, Edward I. did make an Act of State that men should sue him by petition; but this was not agreed unto in Parliament." (4 State Trials, 1034.) There are some other authorities on the subject in the speech of Lord Chief Baron Bridgman, before sentence of some of the regicides, October 16, 1660. (5 State Trials, 1225.)

(*a*) 1 Blackstone's Comm., 246.

(*b*) Burnet, Hist. of his own Times, A.D. 1700.

(*c*) Burnet, *ibid.* The Whigs generally attributed to the Duke of Shrewsbury's influence the change which William III. made in his ministry in the latter part of his reign. (Burnet, A.D. 1710.)

the Treasury, as prime minister. This arrangement was either contrary to the wishes of the King, or at least was unsought for by him(*a*).

This instance established a precedent of no little importance, with reference to the future relations between the Cabinet and Parliament. Another material change in those relations occurred about the same time. What may be termed political impeachments were discontinued. Several of the ministers of William III. and Anne, were after their loss of power impeached on account of their counsels to the Crown. The last such impeachment was that of Harley, Earl of Oxford, in 1717. From that time impeachments were confined to a different class of offences, as corruption or malversation; and the House of Commons found that they possessed a sufficient control over the Cabinet by votes expressing or implying a want of confidence in it(*b*).

Sir Robert Walpole, whose accession to the office of First Commissioner of the Treasury, in 1720, has just been noticed, continued in power throughout the rest of the reign of George I., and a great part of the reign of George II. In 1741, after a new election of Parliament, the majority was turned against Sir Robert Walpole, and he thereupon resigned. This circumstance is remarkable as the first instance during the Hanoverian dynasty of the resignation of a Prime Minister in deference to the will of the House of Commons. The resignation of Sir Robert Walpole led however only to a partial change of the ministry(*c*).

An analogous case to that of the introduction of Wal-

(*a*) The King's favourite minister was Lord Sunderland, and Coxe says, "it was not without great difficulty that Sunderland, who maintained the most unbounded influence over the Sovereign, had been induced, or rather compelled, to consent to the proposed arrangement." (Coxe, Mem. of Sir R. Walpole, vol. i. ch. 22.)

(*b*) When Sir Robert Walpole resigned his office, it was proposed to impeach him. The House of Commons appointed a select committee of inquiry into his administration, but the proceedings against him were interrupted by prorogation of Parliament, and were not proceeded with subsequently. (Smollett, Hist. of Eng., book ii. ch. 6 and 7.)

(*c*) Smollett, Hist. of England, book ii. ch. 7.

pole into the office of prime minister, against the wishes of George I., occurred in the reign of his successor. In 1744, Lord Carteret, who had then become Earl Granville, and prime minister, while retaining the King's favour, was compelled to resign his office by the hostility of the Duke of Newcastle and Mr. Pelham, who had great Parliamentary influence. The King was "forced" and "threatened" to displace his favourite minister, and by the influence of the Pelhams a new Cabinet was formed of their adherents(*a*). The change was a remarkable instance of the power of a few influential political leaders, and is not to be accounted for by any antagonism between the political principles of the old and new ministers, for there was no known difference between them. In 1746, the Earl of Granville endeavoured to retrieve his position in the Cabinet, and the King favoured his pretensions. The Pelhams thereupon resigned, and Lord Granville resumed office, but in three days was compelled to give way to his more powerful opponents(*b*).

George III., influenced probably by a determination to avoid the example of his two Hanoverian predecessors, began his reign with a strong resolution to destroy the system of party government. He took counsel with favourites who were not his ostensible ministers, but a kind of interior Cabinet; but the system was more or less successfully opposed by his various ministers. Mr. Grenville's ministry in 1764, though nearly agreeing with the King in political

(*a*) Mr. May, in his 'Constitutional History,' vol. i. p. 6, says George I. and George II. "cheerfully acquiesced" in the ascendency of their ministers. Lord John Russell however shows that George II. was compelled, sorely against his will, to choose his ministers according to the dictation of the powerful Whig families, and relates a conversation between the King and Lord Chancellor Hardwicke on the subject, a part of which is as follows:—

"*The King.* 'I have done all you asked of me. I have put all my power into your hands, and I suppose you will make the most of it.' *Chancellor.* 'The disposition of places is not enough if your Majesty takes pains to show the world you disapprove of your own work.' *The King.* 'My work! I was forced; I was threatened!'" (Correspondence of John, Fourth Duke of Bedford, Introduction by Lord John Russell, xxxvii.)

(*b*) Smollett, Hist. of Eng., book ii. ch. 9.

principles, insisted on the discontinuance of the secret influence of Lord Bute and other private advisers of the King. Many subsequent changes took place in the administration, brought about, not by any vote of Parliament, for the King by various influences managed to secure a majority there, but by his desire to rid himself from time to time of troublesome ministers, and rule as far as possible without them. This system continued uninterruptedly for twenty years of the reign of George III. It was not until 1782 that a minister of his resigned in deference to the will of Parliament. In that year Lord North's ministry was overthrown by the House of Commons. Lord North, finding a few months after the election of a new Parliament, that he had no longer a majority there, resigned in that year, contrary to the strongly expressed desire of the King, and a new administration was formed under the Marquis of Rockingham(*a*).

This instance is a landmark in the history of Cabinets, for it appears to be the first case since the Revolution of a total change of ministry directly in consequence of a change of the state of parties in Parliament. We have seen an instance in the reign of William III. of a gradual change of ministers, induced partly by the personal feelings of the King, and partly by changes of the relative power of parties in Parliament. We have seen also an instance of a *partial* change in the ministry, in George the Second's time, on the resignation of Sir Robert Walpole. But the advent of Lord Rockingham's ministry to power, in 1782, was remarkable as being a simultaneous change of a whole ministry, in deference solely to the power of Parliament(*b*).

Soon after, another event occurred, which has ever since been regarded as an important precedent in the relations of the King's Council to Parliament, viz. the first instance, after the practice of changing the whole Cabinet at once

(*a*) May's 'Constitutional History,' 53.

(*b*) It is true that Lord Chancellor Thurlow retained his office on the accession of the new ministry; but he did not form part of it, and remained in office at the express desire of the King. (1 May's Constitutional Hist. 52.)

had become established, of an appeal by the ministry to the nation at large, to reverse the preponderance of parties in Parliament. This was in 1784, when, after many hostile resolutions had been passed by the opponents of Mr. Pitt, then prime minister, in the House of Commons, he resolved upon advising the King to dissolve Parliament. At the new election the minister completely triumphed. We have already referred, in a previous chapter, to the rules which that precedent established, and some of the cases in which it has since been followed(*a*).

In order to complete this view of the constitution and power of Cabinets, as deduced from history, it will be necessary to refer briefly to another principle, which in modern times has been often contended for, but as to which, as we shall see, the practice has been extremely various,—that of *political unity of* the Cabinet. By this political unity is meant, not merely union of the ministers in their administrative capacity, but a unanimity, real or professed, in advocating or opposing legislative measures in Parliament. This principle is closely connected with the principle just considered, of dependence of the Cabinet on Parliamentary majorities.

Certainly such unity never existed for many years after the restoration of Charles II. In the plan of Sir William Temple for reconstituting the council in that reign, it was clearly assumed that political leaders of various parties were to debate in council; and, as we have said, the introduction of Lord Shaftesbury and the party opposed to the Court, soon led to dissensions in the Cabinet and changes in the ministry. William the Third's ministers were for the most part composed of persons of opposite political principles. The same was the case for some time in the reign of Anne, until, as has been stated, she made Harley her prime minister. The policy of that change was to constitute a ministry of the same (Tory) principles as those of the Queen;

(*a*) *Ante*, p. 59.

but even then political union was not obtained. Harley was a dissenter, strongly biassed in favour of toleration (a touchstone in politics at that time), and suspected of Hanoverian tendencies; he is said also to have made steps towards reconciliation with the Whig party. Lord Bolingbroke, his principal colleague, was, on the contrary, a strong opponent of the Whigs and dissenters, and the Jacobites looked to him for support. The dissensions between the two ministers were great and frequent. The Council Chamber was turned into a scene of obstinate dispute and bitter altercation; and even in the Queen's presence, the Treasurer and Secretary did not abstain from mutual obloquy and reproach(*a*).

In the next reign, until Walpole became prime minister in 1721, there were frequent divisions in the Cabinet, arising out of intrigues and jealousies among the powerful Whig families, which then had the highest influence in the State. Walpole inaugurated a system of complete subordination among the members of his administration. In the reign of George II. he almost engrossed the supreme direction of public affairs; by patronage and corruption, he effectually secured a majority in the House of Commons favourable to his power, and among his colleagues met with no resistance to his authority. When he was driven from power by the "country party," in 1742, this system of political union of the ministers of the Crown was discontinued. In the following administration of the Pelhams, undeviating deference to the prime minister no longer characterized the subordinate members of the administration. It was not unusual to see the great officers of the Government divided in Parliamentary debate, and to hear the Secretary at War opposing with great vehemence a clause suggested by the Chancellor of the Exchequer. After the death of Mr. Pelham, in 1754, his brother, the Duke of Newcastle, succeeded him as prime minister. At that period, also, the ministers of the Crown were in a considerable degree inde-

(*a*) Smollett, book i. ch. 10, A.D. 1714.

pendent of each other in Parliament. Pitt and Fox, who were in 1785 colleagues in office under the Crown, though rarely agreed in any other particular, were generally united in opposing the measures of Sir Thomas Robinson, the Secretary of State(*a*).

During the first twenty years of the reign of George III., the manner in which, as we have seen, he personally interposed in the administration of Government, effectually prevented anything of that political union of ministers, and subordination to the chief minister, which had prevailed in Walpole's time. Many of the King's friends who held offices in the Government or Royal household, looked to the King, and not to his principal ministers, for instructions, and therefore frequently acted in opposition to the latter. Thus, to cite one instance among many, when Lord Rockingham's ministry proposed, in 1766, the repeal of the Stamp Act, which had mainly caused the disputes with the American colonies, the ministerial measure was, by the instigation of the King, opposed by members of the Court party who held offices under Government(*b*).

This system was discontinued when Mr. Pitt became premier, in 1783. The King was no longer his own minister, but yielded to the superior intellect of his chief constitutional adviser. His ministry commanded an irresistible majority in Parliament, and met with no opposition there from any of its members or other servants of the Crown. This continued till the repugnance of the King to Roman Catholic emancipation led to Pitt's resignation, in 1801. After a short interval, in which Mr. Addington, subsequently Lord Sidmouth, was prime minister, Pitt was restored to power, in 1804. Addington then took up a position in the House of Commons, as leader of the King's friends, who sometimes voted against Pitt, but afterwards, on Addington joining his ministry, generally supported him. During the Grenville ministry of 1807, after Pitt's

(*a*) Smollett, book iii. ch. 1, 4.
(*b*) 1 May's Constititional Hist. 32.

death, the King renewed his system of opposition to his own ministers, and the withdrawal of their measure for Catholic emancipation alone prevented the King's friends in Parliament from voting against them. After the formation of Mr. Perceval's ministry, in 1807, the Tory party ruled in the King's councils and in Parliament to the end of his reign, without opposition from the party of the "King's friends"(*a*).

In 1812, Lord Wellesley, by the command of the Regent, made an offer to the Whig lords so to compose the Cabinet as to give them a majority of one. This was declined, on the plea that to construct a Cabinet on a system of counteraction, was inconsistent with the prosecution of any uniform and beneficial course of policy(*b*).

It will thus be seen, that with the exception of the periods when two unusually powerful ministers, Sir Robert Walpole and Pitt, were in office, the principle of political union among the ministers of the Crown in Parliament was not observed until the close of the reign of George III. The principle is indeed a modern one, and seems to have been introduced by Sir Robert Walpole, then discontinued during the administration of his less powerful successors, then introduced by Pitt, but not uniformly maintained by him against the influence of the Crown. In the succeeding reigns, the practice has been for all the responsible ministers of the Crown to avoid opposing each other in Parliament on measures of great importance, excepting the rare cases in which, by previous arrangement among themselves, certain questions brought before Parliament are treated as "open" questions; that is, questions on which ministers in Parliament are allowed to take opposite sides without resigning(*c*). Where any of the ministers of the Crown have been unable to agree with the prime minister as to their course in Parliament, the practice adopted in the pre-

(*a*) 1 May's Constitutional Hist., ch. 1.
(*b*) Stapleton, 'George Canning and his Times,' 201.
(*c*) Earl Grey's 'Parliamentary Government,' p. 104.

sent century, has been for the dissentients to retire from office. Thus, under Lord Grey's government, in 1834, Lord Stanley, and other members of the Cabinet who were unable to agree with Lord Grey on the question of appropriation of the surplus revenues of the Church of Ireland, retired from office.

Of course, the union of ministers in Parliament increases their legislative power; and if they be supported by an obsequious majority who uniformly support them, the result is to transfer the business of legislation from Parliament to the administrative government. This is a result which the the most strenuous advocates of party government would scarcely defend; and yet in their defence of that system of government, they never define the limits of party obligations. The concurrent testimony of constitutional writers is adverse to the union of administrative and legislative functions, but where the ministers of the Crown have, by means of an obedient party, supreme power in Parliament, it is clear that the union is nearly complete. Experience confirms the theoretical objections to such union; for the domination of an irresistible party has generally proved unfavourable to moderate and impartial legislation. The blind deference of the majority of Parliament to their leaders which formerly existed was due in a great measure to this circumstance, that a large part of the members of Parliament were incapable of forming a sound independent judgment upon measures submitted to them, and were therefore content to be guided by their leaders. But in the modern House of Commons, the average of education and ability has been greatly elevated; there is consequently a large and increasing class of its members, who are able to investigate for themselves the merits of the legislative measures brought before them, and who conform to their summons to Parliament, which certainly requires them to exercise their judgment independently, and not to give to ministerial measures an indiscriminate support or opposition (*a*).

(*a*) Probably the most able and complete defence of party government is

The doctrine of party obligations is, as we have seen, comparatively new. There is little trace of it till the corrupt times of Sir R. Walpole. Much has been said in modern times about the importance of these obligations, but little or nothing about their limits. Yet, if they exist at all, they must have limits; for no one will contend that party obligations require a member of Parliament to vote on all occasions with his leader. Then, if not, in what cases may a member use his own judgment and dissent from his leader? When, on the other hand, must he surrender his own judgment and convictions to his leader? That he must sometimes do so is clear, for otherwise party obligations would be mere nullities. The very first necessary condition of all useful controversy is wanting in the controversy about party obligations, for they are nowhere defined.

The effects of party obligations are so much matters of political controversy, that it is not within the scope of this work to answer all the arguments which are most commonly urged in favour of those obligations. One general remark may, however, be applied to those arguments,—that they are founded on speculative, and not on historical, considerations; that they advert, not to evils which have resulted, but to evils which are deemed likely to result from the abolition of party government. Some have thought that if the initiation of legislative measures were not confided chiefly to ministers of the Crown, the legislature would be overwhelmed by the multitude of proposals of private members of Parliament. Others, on the contrary, among whom was Bentham(*a*), have thought that unless the duty of originating laws were assigned to particular persons, the legislature would be reduced to inaction. These objectors do

that contained in Earl Grey's 'Parliamentary Government' (8vo, London, 1858), in which the arguments against Parliamentary government in the "British Commonwealth" are referred to and answered. But neither in Lord Grey's work, nor in any other—as far as the present writer is aware—is there any definition of the limits of party obligations; and without such a definition it seems impossible to reason strictly on the validity of those obligations.

(*a*) Essay on Political Tactics, ch. 7.

not consider that in the history of Parliament only a very small space is occupied by party Government, and that it has prevailed only for comparatively short and interrupted periods of the last and present century. We look in vain for any trace of it in the best epochs of the history of Parliament, such, for example, as the latter part of the reign of James I., and the earlier part of that of Charles I.—the epochs of the Grand Committees of Grievances, and the Petition of Rights.

In the foregoing part of this chapter we have considered the King's Council principally in its relations to the legislature. It remains to add some general particulars respecting *appointment, qualifications, duties, and powers* of Privy Councillors.

Privy Councillors are made by the King's nomination, without either patent or grant; and upon taking the necessary oaths they become immediately Privy Councillors during the life of the King who chooses them, but subject to removal at his discretion.

Of this body, the selected members who compose the Cabinet, are the First Lord of the Treasury (Prime Minister, according to modern nomenclature derived from the French), the Lord Chancellor, the Secretaries of State, the Chancellor of the Exchequer, and the heads of some other executive departments, and occasionally there are members of the Cabinet who have no such offices.

As to the *qualifications* of Privy Councillors.—Any natural-born subject of England is capable of being a member of the Privy Council; but in order to prevent any persons under foreign attachments from insinuating themselves into this important trust, as happened in the reign of William III. in many instances, it is enacted by the Act of Settlement (12 & 13 Will. III. c. 2), that no person born out of the dominions of the Crown of England, unless born of English parents, even though naturalized by Parliament, shall be capable of being of the Privy Council. But 1 Geo. I. st. 2, c. 4, goes still further; for it enacts that no

bill of naturalization shall be received without a clause incapacitating the naturalized person from being in the Privy Council, Parliament, or office under the Crown(*a*). When it has been intended to dispense with these incapacitating provisions in favour of any naturalized person, it has been the practice first to pass an Act for the repeal of these statutes in his favour, and then an Act of naturalization without any exception(*b*). This course was adopted in the case of the late Prince Albert, Consort of Queen Victoria. But the provision of the 1 Geo. I. above-mentioned has since been repealed(*c*).

The *duties* of a Privy Councillor appear from the oath of office, which consists of seven articles:—1. To advise the King according to the best of his cunning and discretion. 2. To advise for the King's honour and good of the public, without partiality, through affection, love, meed, doubt, or dread. 3. To keep the King's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be resolved in Council. 6. To withstand all persons who would attempt the contrary. 7. To observe, keep, and do all that a good and true counsellor ought to do to his Sovereign Lord.

The *powers* of the Privy Councillors, as advisers of the Crown, have been already referred to. Besides these, they have also certain judicial and administrative powers, which will be described under the heads of Judicature and Administration. The judicial powers of the Privy Council are now principally exercised by the Judicial Committee of that body, the constitution and powers of which are regulated by statute, as will be explained hereafter. The administrative powers of the Council are principally exercised by committees of that body, such as the Committee on Education, and the Board of Trade, the account of which is also reserved to a subsequent chapter.

(*a*) 1 Geo. I. stat. 2, c. 4, s. 2.
(*b*) 1 Blackstone's Comm., 230; Butler's Co. Litt. 129 *a*.
(*c*) 3 & 4 Vict. cc. 1, 2; 7 & 8 Vict. c. 66, s. 2.

CHAPTER XI.

THE RIGHTS OF PETITION, PUBLIC MEETINGS, AND THE PRESS.

THE influence of public opinion in legislation is so great, that an inquiry respecting the Legislature would be incomplete without a consideration of the laws affecting the principal means of expressing public opinion. These are:—1. Petitions. 2. Political speeches. 3. Political societies and meetings. 4. The Press.

1. *Petitions.*—We have seen in former chapters that for some time after the establishment of the two Houses of Parliament, legislation was founded upon the petitions of the Commons to the Crown, and the answers to these petitions. In this place it is intended to treat of another class of petitions, which are addressed to the Crown or either House of Parliament.

The earliest of such petitions were for the redress of merely private grievances. From the Rolls of Parliament in the reigns of Edward I., Edward II., and Edward III., it appears that petitions were exhibited by all sorts of persons upon all sorts of matters. It seems to have been thought that Parliament was an assembly for the redress of all wrongs which any man sustained either in person or property. To distinguish between those petitions which were properly within the cognizance of Parliament and those which were not, certain "Receivers and Triers" of petitions

were appointed. The office of the latter was to examine all petitions, and upon full consideration to indorse upon them what course was to be pursued to redress the petitioner; and to direct him, according to the nature of his case, either to full Parliament, or the Council, or to some other Court. The appointment of receivers and triers is still continued in the House of Lords, though their duties have long ceased(*a*).

The practice of petitioning Parliament for the redress of *public* grievances does not appear to have been common before the reign of Charles I., though there are some earlier instances of such petitions to Parliament(*b*). In the Long Parliament of Charles I., a multitude of public petitions were presented, and generally received with censure where the petitioners' sentiments did not agree with those of the prevailing party(*c*). Both Houses of Parliament came to

(*a*) Hale's 'Jurisdiction of the Lords' House,' ch. 12.

Among the earlier instances of the appointment of receivers and triers, the following may be cited:—In 33 Edw. I., A.D. 1305, the King appoints four persons to receive all petitions presented in Parliament at each of the two sessions in that year. (Parry's 'Parliaments,' 66, 67.) By 14 Edw. III. c. 5, at every Parliament a prelate, two earls, and two barons are to be chosen to hear, by petition, all complaints of delays in Chancery and the courts of law.

(*b*) Thus, in 2 Hen. V., A.D. 1414, certain landholders of Kent present a petition, complaining that lands of certain tenures are improperly exempt from the levy for wages of knights of that county. (Parry's 'Parliaments,' 171.) In 23 Eliz., A.D. 1584, three petitions are read, touching "the liberty of godly preachers to exercise and continue their ministry, and for the speedy supply of able and sufficient men into divers places now destitute of the ordinary means of salvation." (*Ibid.* 226.)

(*c*) Thus, March 2, 1642, a conference is held respecting a petition from Kent, which, praying for a restoration of the bishops and liturgy, is voted seditious and against privilege. April 21, the Commons order the actors in the Kentish petition to be brought to trial. April 11, 1646, the Commons resolve that a petition presented by the Assembly of Divines is a breach of privilege. April 11, 1649 (in the time of the Commonwealth), a petition is received from "divers well-affected persons of London, Westminster, and Southwark, etc. in behalf of Lieut.-Col. Lilburne and others." Resolved, "That the petitioners have a sharp reprehension." April 17, 1650: Resolved, upon a petition from the City of London, "That the scope of it is to bring scandal and reproach upon the just and necessary laws and proceedings of Parliament, and that it be referred to the Council of State."

a resolution in 1642 against counter-petitions, "as no man ought to petition for the Government established by Law, because he has already his wish; but they that desire an alteration cannot otherwise have their desires known, and therefore are to be countenanced"(*a*). In 1648, on the occasion of a tumultuously presented "petition of divers thousands, knights, gentry, freeholders of the county of Surrey," the Houses order that all petitions shall be brought by a number not exceeding twenty persons, and shall be delivered to the knights, citizens, or burgesses which serve for the county, city, or borough so petitioning.

In the Long or Pensionary Parliament of Charles II., which sat in the year after the Restoration (A.D. 1661), the right of petition was recognized by the statute 13 Car. II. s. 1, c. 5; for that statute provides that no one shall solicit the consent of any person above the number of twenty to any petition to the King or either House of Parliament for any alteration in church or state, unless the matter of the petition be approved by three Justices of the Peace, or the major part of the grand jury in the country, and in London by the Lord Mayor, Aldermen, and Common Council; nor shall any petition be presented by more than ten persons at a time. The proviso in the Act says, "That neither that Act, nor anything therein contained, shall be construed to extend to debar or hinder any person or persons, not exceeding the number of twenty aforesaid, to present any public or private grievance or complaint to any member or members of Parliament after his election, and during the continuance of the Parliament, or to the King's Majesty for any remedy to be thereupon had"(*b*).

In 32 Car. II., A.D. 1680, the House of Commons resolved, *nem. con.*, that "It is, and ever hath been, the undoubted right of the subjects of England to petition the King for the calling and sitting of Parliaments, and for redressing all grievances. That to traduce such petitioning as a violation of duty, and to represent it to his Majesty as

(*a*) Parry's 'Parliaments,' 383. (*b*) 13 Car. II. c. 5, s. 3.

tumultuous and seditious, is to betray the liberty of the subject, and contributes to the design of subverting the ancient legal constitution of this kingdom, and introducing arbitrary powers." The House at the same time appointed a committee to inquire of all such persons as had "offended against these Rights of the Subject"(*a*). It has been stated in a previous chapter, that the House expelled one of its members for joining in a petition to the Crown, expressing an abhorrence of petitions for the calling of Parliaments; and that in its proceedings against other "abhorrers," the House exercised an illegal power, which was effectually resisted(*b*).

The most momentous occasion of the exercise of the Right of Petition was that of the presentation of a petition by seven bishops to King James II., May 18, 1688, praying the King to recall his proclamation for reading the Proclamation of Indulgence in churches. The seven bishops were tried upon an information in the King's Bench shortly afterwards, which charged them with maliciously and seditiously composing, writing, and publishing a false, malicious, pernicious, and seditious libel contained in this petition. In the course of the trial it was more than once allowed by several of the judges that the Subject has a liberty to petition the King as well out of Parliament as in it. The Lord Chief Justice told the jury that the presentation of the petition to the King was a publication of it, and that whether it was libellous was a question of law. He defined anything "that shall disturb the government and make mischief and a stir among the people" to be a libel, and gave his opinion that the petition was a libel. Justice Holloway however told the jury that it was left to them to consider whether there was "an ill intention of sedition," and that to make it a libel it must be false, malicious, and tend to sedition. Justice Allybone agreed that every man may petition in a matter that relates to his private interest, but not in a matter that relates to the government. This proposition was

(*a*) Parry's 'Parliaments,' 591. (*b*) *Ante*, Ch. IX. sect. 6.

however contested by Justice Powell. The jury acquitted the bishops(*a*).

The Bill of Rights passed after the Revolution, 1 Will. & Mary, sess. 2, c. 2, refers to this prosecution, reciting that the late King James II. endeavoured "to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom" in various ways mentioned; one of which is, "By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the said assumed power" (the dispensing power). The Act declares "That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal."

It has sometimes been questioned whether this provision of the Bill of Rights repealed the previous Act of Charles II., limiting the rights of petition. Blackstone(*b*) expressly states, that the right to petition declared by the later statute is under the regulations prescribed by the earlier statute; and Lord Chief Justice Mansfield directed the jury at the trial of Lord George Gordon for high treason, in 1781, that neither the Bill of Rights, nor any other statute, repeals the Act of Charles II. The overt act of treason charged against Lord George Gordon was the assembling a multitude, who went to the House of Commons with a petition of the "Associated Protestants," and committed many acts of violence. The jury acquitted him(*c*).

The learned editor of Coke upon Littleton(*d*) questions

(*a*) The twelfth volume of Howell's 'State Trials' (8vo, 1812) gives a full account of the proceedings on this momentous trial, and an admirable collection of notes relating to it. There is not extant a more deeply interesting description of the trial and its consequences than the authentic account in the 'State Trials.'

(*b*) 4 Blackstone's Comm., 148.

(*c*) 21 State Trials, 485.

By 57 Geo. III. c. 19, s. 23, assemblies in any street, square, or open place of more than fifty persons, within one mile of Westminster, for the purpose of petitioning the King or Parliament, while Parliament is sitting, or the judges sit in the courts of Westminster, is illegal.

(*d*) Butler's Co. Litt. 257 *a*, note 3.

the accuracy of Blackstone's opinion, that the regulations of 13 Car. II. were not repealed by the Bill of Rights. The question however is of little importance, as the regulations in question have long been disregarded in practice, and the Houses of Parliament receive without objection petitions however numerously signed.

Notwithstanding the declaration of the right of petitioning contained in the Bill of Rights, the free exercise of that right was not established till a considerable time afterwards. In 1701, the presentation of the famous Kentish petition to the House of Commons was resented by the House in a manner which has been already mentioned(*a*). The petition, which was very respectfully expressed, and prayed the House that its "loyal addresses may be turned into Bills of Supply," was signed by above twenty justices of the peace of the grand jury of the quarter sessions at Maidstone. The House voted the petition seditious, and imprisoned to the end of the session five of the petitioners who presented it.

In the latter part of the last century, the number of petitions to Parliament became largely increased. Of this great multiplication of petitions, the earliest instances are those of the petitions for the abolition of the slave-trade in 1787, or those of the petitions in 1779 for Parliamentary reform. Among the petitions at that time was one signed by upwards of 5000, and another signed by upwards of 8000 electors. The petition of Lord George Gordon's associates above referred to was signed by above 120,000 persons(*b*). The most numerously signed petitions which have ever been presented to Parliament were those of 1848, praying for universal suffrage, when 577 such petitions received upwards of two millions of signatures.

2. *Political Speeches.*—The right of petitioning for redress of public grievances presupposes a right of discussing

(*a*) *Ante*, Ch. IX., Sect. 6.

(*b*) May's Constitutional History, 441.

such grievances. The laws relating to political meetings, associations, and speeches are very numerous, but are now rarely enforced. The laws affecting the right of political discussion are of two kinds, which it will be convenient to consider separately,—those relating to speeches, and those relating to meetings and associations.

It is a most important principle of English law that bare words are not overt acts of treason. Sir Michael Foster, in his treatise on Crown Law(*a*), thus states the law on this point, and some authorities for it:—"Lord Chief Justice Hale was of opinion that bare words are not an overt act of treason. Coke was of the same opinion. Hale has treated the subject much at large, and I shall not repeat his argument; but I must say I think his reasons founded on temporary acts, or acts since repealed, which make speaking the words therein set forth felony or misdemeanour, are unanswerable; for if these words, seditious to the last degree, had been deemed overt acts within the Statute of Treasons, the legislature could not, with any sort of consistency, have treated them as felony or misdemeanour."

But the humane provision of our law, which requires every treason to be demonstrated by some overt act less dubious than bare speech, has not been universally acted upon. Our history shows some cruel examples to the contrary. Blackstone cites two instances, in the reign of Edward IV., of persons executed for treasonable words: the one, a citizen, who said he would make his son heir to the "Crown," being the sign of the house in which he lived; the other, a gentleman, who, when the King killed his favourite buck, was accused of saying he wished it were horns and all in the King's belly. Chief Justice Markham chose rather to leave his place than assent to the latter

(*a*) Foster, Discourse on Crown, subjoined to Reports of Crown Cases, Discourse 1, ch. 1, sect. 7. "It is now settled that bare words not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason, but only a misprision, punishable at common law by fine and imprisonment or other corporal punishment." (East, 'Pleas of the Crown,' ch. 2, s. 55.)

judgment(*a*). This last case to which Blackstone refers was that of one Burnet, a servant of the Duke of Clarence. The case of Clarence himself is a more illustrious example of conviction of treason for words. He was attainted (and drowned, as it was said, in a butt of malmsey) for "seditious discourses," charging the King with injustice in the attainder of Burnet; with dealing in necromancy; and for publishing that the King was a bastard, and incapable to reign(*b*).

The wise and humane limitations within which our law had, in the reign of Edward III., restricted the offences of treason and misprision of treason, were disregarded in the reign of Richard II., and again by the obsequious Parliament of Henry VIII., in the 25th and 26th years of his reign(*c*). The Act concerning the King's succession (25 Hen. VIII. c. 22) declared Henry's first marriage void; confirmed that with Anne Boleyn; made it *high treason* by "writing, or imprinting, or by any exterior act or deed," to imperil the King's person, or disturb his title, or slander his marriage; made it *misprision* of treason "by any words without writing, or any exterior act or deed," to maliciously divulge anything to the peril of the King or the slander of the marriage; and required every person to take an oath to adhere to the contents of the statute, making it misprision of treason to refuse the oath. A statute(*d*) of the next session went a step further, in attaching penal consequences to words. The misprision of treason, defined by the preceding statute, was not a capital offence; but by 26 Hen. VIII. c. 13, any one who maliciously willed by "*words* or writing," or by craft attempted any bodily harm to the King, or to deprive him of his dignity, title, and name, or by "express writing or words" maliciously pronounced him heretic, etc., was liable to be convicted of high treason.

A previous statute of the same session (26 Hen. VIII. c. 1) declared the King to be supreme head of the Church.

(*a*) 4 Blackstone, 80.
(*b*) 1 State Trials, 275.
(*c*) 4 Blackstone, 86.
(*d*) 26 Hen. VIII. c. 13.

It was by the conjoint operation of these statutes that Sir Thomas More, Bishop Fisher, and several of the monks of Charter House were convicted of high treason shortly afterwards for not acknowledging the King's supremacy. Bishop Burnet has a strange apology for these convictions; he says that the statement that many were put to death for not swearing the King's supremacy is "an impudent falsehood, for not so much as one person suffered on that account. . . . It cannot but be confessed that to enact under pain of death that none shall deny the King's titles, and to proceed upon that against offenders, is a very different thing from forcing them to swear the King to be supreme head of the Church"(*a*). But the distinction here made by Burnet will not avail to excuse the execution of Sir Thomas More, for he most carefully avoided being drawn into a denial of the King's supremacy; and the Attorney-General expressly told him at his trial, "though we have not one word or deed of yours to object against you, yet we have your *silence*, which is an evident sign of the malice of your heart"(*b*).

(*a*) Burnet, Hist. of the Reformation.

(*b*) 1 State Trials, 389. An eminent constitutional writer, Mr. Hargrave, in his edition of the 'State Trials,' comments with just severity on Burnet's apology for these proceedings thus:—"When it is objected to Henry as a cruelty that many were put to death for not swearing to his supremacy, without doubt every denial of it, whether implied by refusing the oath or expressly by words, was meant. Therefore, it is foreign to the spirit of the remark to say that they were thus punished for denying the supremacy, not for refusing to swear to it. So verbal an answer to the animadversion of Henry's enemies would scarce have escaped the learned bishop, if he had not been insensibly influenced by a fear lest the justice and propriety of the Reformation should be prejudiced by the cruelty of Henry's measures in its commencement. But the cause of truth is never finally helped by an ill-founded argument. The Reformation rests on a better foundation than Henry's actions." (1 State Trials, 473 *n.* (8vo, 1816).)

The sanguinary legislation of the twenty-fifth and twenty-sixth years of Henry VIII., and the consequent prosecutions, have found a modern apologist. Speaking of the Act of Treasons, 26 Hen. VIII. c. 13, Mr. Froude observes, "The nation was standing with its sword half-drawn in the face of an armed Europe, and it was no time to permit dissensions in the camp. Toleration is good, but even the best things must abide their opportunity; and although we may regret that in this grand struggle for

The sanguinary laws of Henry VIII. respecting treasons, were repealed immediately after the accession of his successor. By 1 Edw. VI. c. 12, it was enacted that "no act, deed, or offence being by Act of Parliament or statute made treason or petit treason, by words, writing, ciphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, and adjudged to be high treason or petit treason," except under the Statute of Treasons, or that *statute*. The statute proceeds to make the denial of the King's supremacy, and attempts to depose him, etc., by "open preaching, express words or sayings," treason upon a *third* conviction; and where the like offences are committed by writing, printing, overt act or deed, they are made treason in the first instance.

The first statute of the succeeding reign of Mary went still further, and brought back the law of treasons completely to its ancient state in the time of Edward III. After reciting that by extreme laws persons are "often trapped and snared, yea, many times for words only, without other fact or deed done or perpetrated," and referring to noble persons and others who had of late, for words only, suffered shameful death, the Act provides that no act or offence by words, writing, ciphering, deed, or otherwise whatsoever,

freedom success could only be won by the aid of measures which bordered upon oppression, yet here also the even hand of justice was but commending the chalice to the lips of those who made others drink it to the dregs. They only were likely to fall under the Treason Act who for centuries had fed the rack and the stake with sufferers for opinion." (Froude's Hist. of England, vol. ii. p. 331.)

The last sentence is of course not to be construed literally; for the Treason Act could not be enforced against deceased persons who lived in previous centuries. It is probably meant that the victims of the Act were properly held responsible for cruelties committed by other persons in previous centuries. This seems a strange notion of the "even hand of justice." The other excuse given by Mr. Froude for this statute is its necessity. That plea is a common defence where no other is possible. Rich, the Solicitor-General, was sent to More in the Tower to entangle him in conversation. Was this *necessary?* or was it necessary for the Privy Council to press him (as they did) "with all the arguments they could think of to own the King's supremacy in direct and open terms or plainly to deny it?" (See 1 State Trials, 386.)

shall be treason, petty treason, or misprision of treason, but as declared by the Statute of Treasons of 25 Edw. III.(*a*). But this laudable vindication of the ancient law of treasons was soon marred by a subsequent Act of the same reign, 1 & 2 P. & M. c. 10; whereby any person who, during the marriage of the King and Queen, compassed to depose the Queen, etc., by express words or sayings, was liable, after a second conviction, to the penalties of high treason.

Temporary Acts of the reign of Elizabeth, 13 Eliz. c. 1, and 14 Eliz. c. 2, made the publication of words and writings treason in certain cases.

In the reign of Charles I., the judges agreed in the case of one Pyne, "that though the words were as wicked as might be, yet they were no treason; for, unless it be by some particular statutes, no words will be treason"(*b*).

This wholesome rule was set aside by an Act of the Commonwealth, in 1649, by which the malicious and advised publication by writing, printing, or openly declaring that the Government was unlawful, was made treason(*c*).

After the Restoration, an Act was passed, 13 Car. II. c. 1, by which, any person who during the reign of Charles II., should compass the King's death, etc., and declare such compassing by printing, writing, or malicious and advised speaking, should be liable to the penalties of high treason. Under this statute William Stayley was convicted and executed, in 30 Car. II., A.D. 1678. Scroggs was his judge, and vehemently harangued the jury against him; as soon as they returned their verdict, Scroggs told the prisoner, "Now you may die a Roman Catholic; and when you come to die, I doubt you will be found a priest too"(*d*).

Serjeant Maynard was one of the counsel for the prosecution on this trial, but appears to have confined himself to directing the attention of the jury to the evidence. In the time of James II. we find him acting a much nobler part.

(*a*) 1 Mary, sess. 1, c. 1.
(*b*) 4 Blackstone, 80; 1 State Trials, 359.
(*c*) See 4 State Trials, 1349. (*d*) 6 State Trials, 1510.

In that reign, A.D. 1682, an Act was projected, by which words were to be made treasons; and the clause was so drawn that anything said to disparage the King's person or Government was made treason. This was chiefly opposed by Serjeant Maynard, who, in a very grave speech, laid open the inconvenience of making words treason; they were often ill-heard and ill-understood, and were apt to be miscredited by a very small variation. Men in passion or drink might say things they never intended; therefore he hoped they would keep to the law of 25 Edw. III., by which an overt act was made the necessary proof of an ill intention. He brought the instance of our Saviour's words, "Destroy this temple," and showed how near "the temple" was to "this temple," pronouncing it in Syriac, so that the difference was almost imperceptible(*a*).

The bill however did not pass; nor since the statute of Mary brought back the law of treasons to its old state, has any statute, with temporary exceptions above-mentioned, been passed making words treason. But though bare words not relative to any act or design are not overt acts of treason, words connected with facts or expressive of the intention of the speaker may, in some circumstances, bring him within the Statute of Treasons(*b*).

We have thus reviewed the principal statutory alterations of the law of treasons with respect to words, because of the important effect of that law upon the liberty of political discussion. Though political speeches, however offensive, cannot amount to treason in themselves, yet they are in many cases rendered highly penal, partly by statute, and partly by common law. To dispose first of all of the statutes(*c*) by which speeches are rendered criminal, it will be sufficient to cite the statute 13 Car. II. c. 1, by which to assert maliciously or advisedly, by speaking or writing, that Parliament has a legislative power without the King, is

(*a*) Burnet, Own Times, A.D. 1685.

(*b*) Foster, Cr. Law, Discourse 1, c. 1, sect. 8; Starkie, Law of Slander and Libel, 2nd ed. vol. ii. p. 168.

(*c*) Among them are the expired statutes 1 Eliz. c. 5 and 6.

declared a præmunire. By 6 Anne, c. 7, the assertion maliciously and directly, by "preaching, teaching, or advised speaking" of the right of the Pretender to the throne, or that the King and Parliament cannot limit the succession to the Crown, was made a præmunire. By 11 Vict. c. 12, compassing to depose the Queen, to levy war against her in order by force or constraint to compel her to change her measures or counsels, or to put force against or restraint upon Parliament, or to incite invasion of this realm and its dependencies, are declared felony, if expressed by publishing any printing or writing, or by open and *advised speaking*.

The offence of "sedition" (*a*) does not appear to be very exactly defined. It has been said to include all contemptuous, indecent, or malicious observations upon the King's person or government, whether by writing, or speaking, or by tokens, calculated to lessen him in the esteem of his subjects, or weaken his government, or raise jealousies of him among the people (*b*). Blackstone gives nearly the same definition of "contempts and misprisions against the King's person and government" (*c*). But here a most important question arises,—What is the boundary between seditious speeches and lawful discussion and criticism of political measures? It is very difficult to draw the line with absolute precision. Perhaps it cannot be drawn more clearly

(*a*) Sedition is not usually included in the division of offences in our law, but as coupled with other offences; and it is said there is no instance of an indictment for the crime of sedition singly. In the English law, sedition is not often spoken of substantively, but the adjective of the word is common, as in "seditious libel," "seditious and slanderous news," etc. (See proceedings against Stroud and others, 5 Car. I., 3 State Trials, 235.) But by the law of Scotland sedition is recognized as a distinct crime: verbal sedition, or leasing-making, is inferred from the uttering of words tending to create discord between the King and his people; real sedition is generally committed by unlawfully convoking a considerable number of people under the pretence of redressing some public grievance. (Erskine, 'Law of Scotland,' book 4, tit. 4, § 14.)

(*b*) East's 'Pleas of the Crown,' ch. 2, § 1.

(*c*) 4 Blackstone, 123.

than has been done by a learned writer in the following remarks on the subject:—"It is the undoubted right of every member of the community to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation. . . . Where public mischief is the *object of the act*, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and therefore criminal"(*a*).

3. *Political Societies and Meetings.*—We next proceed to consider how far political societies and meetings are prohibited by law.

The law on this subject is too copious and complex to be fully stated here. That law has undergone repeated changes during many centuries, has been debated and disputed in a vast number of political prosecutions; and to add to the difficulty of the subject, many doctrines respecting it, which were authoritatively established in former times, have in our own more tranquil age been suffered to become almost obsolete, though not positively overruled. It will be sufficient to consider here some few principal propositions respecting political meetings and assemblies under the following heads:—*constructive treason; riot; conspiracy;* and the statutes passed in the last and the earlier part of the present century respecting *unlawful societies.*

In the first place, let us consider how far political assemblies are liable to the operation of the law of *treason.* One kind of treason defined by the Statute of Treasons of Edward III. is, "if a man do levy war against our Lord the King, in his realm;" and by a construction of this statute, the levying of war against the King may be by taking arms, not only to dethrone the King, but under pretence to reform religion or the laws, to repeal a law, or remove

(*a*) Starkie on the Law of Slander and Libel, vol. ii. p. 184, 2nd ed.

evil cc....., or other grievances, whether real or pretended. For, says Blackstone, "the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power for these purposes in the high Court of Parliament." The proposition here stated is unobjectionable, if due attention be paid to the word "forcibly" in the quotation; but the degree of force, which is a necessary part of this species of constructive treason, has been by no means uniformly settled. In some old cases, very slight demonstrations of forces have been construed to be a levying of war; and a great authority, Justice Foster, holds that circumstances of warlike array and arms are not essential to the crime(*a*). The soundness of this opinion has been greatly controverted(*b*); but it is to be observed that Foster does not go so far as to say that exercise or display of force is not essential to the crime. It is quite clear that a strictly peaceable assembly cannot be brought within the operation of this branch of the law. The constructive treason here considered is thus explained by an eminent judge. "If there be an insurrection—that is, a large rising of the people—in order by force and violence to accomplish or avenge any private object of their own, that would not be high treason, that would not be levying war against the King; but if it be to effectuate any general public purpose, that is considered by the law as a levying of war. There must be an insurrection; force must accompany that insurrection; and it must be for an object of a general nature. But if all these circumstances concur—insurrection, force attending it, and the object of a general nature—that is quite sufficient to constitute the offence of levying war"(*c*).

(*a*) Foster's Crown Law, Discourse 1, ch. 2, p. 208.

(*b*) Luders, Considerations on the Law of High Treason in the Article of Levying War, p. 52.

(*c*) Per Lord Chief Baron Richards, in the trial of Brandreth. (32 State Trials, 928.)

One of the most celebrated trials for the constructive treason of levying

It is, as we have seen, an essential part of the offence in question that the insurrection should be for an object of a general nature. A tumult on account of a particular or private grievance amounts at the most to a riot, this being no general defiance of public government(*a*). The Riot Act, 1 Geo. I. st. 2, c. 5, made a great change practically in the law with respect to constructive treason; for that Act legislated with regard to offences the same in kind and effect as those which had been previously regarded as constructive treasons(*b*). The Riot Act defines a riot to be an unlawful assembly of twelve persons or more to the disturbance of the peace; authorizes justices and others to command them by proclamation to disperse; and renders contempt of such command a felony. It is settled that mere numbers do not constitute a riot; there must be such circumstances of violence, or tendency thereto, as to reasonably cause terror to the Queen's subjects(*c*).

Political meetings and assemblies are also in some cases subject to the law of *conspiracies*. The crime of conspiracy consists in the agreement of two or more persons to do an illegal act, or to do a lawful act by unlawful means. A conspiracy may amount to a treason, or a less offence. So far as relates to political societies and meetings, it seems clear that an agreement to endeavour, by the merely general influence of such bodies, to procure a change of the laws, does not amount to a conspiracy; there must be proof of the specific exertion or intention to exert force against some lawful authority. Lord Chief Justice Eyre, in his charge(*d*) to the grand jury in the cases of Hardy and

war was that of Lord George Gordon, for assembling a mob which carried a petition of the protestation to the House of Parliament, and afterwards committed many outrages in different parts of London. Dr. Johnson is reported to have said, in reference to this trial, "I am glad Lord George Gordon has escaped, rather than a precedent should be established of hanging a man for constructive treason." (21 State Trials, 651.)

(*a*) 4 Blackstone, 94.

(*b*) Luders, Considerations, etc. ch. 3, p. 103.

(*c*) Hawkins's Pleas of the Crown, book i. ch. 65.

(*d*) 24 State Trials, 199.

Horne Tooke, in 1794, held that an agreement to bring about changes in the Constitution by "an usurped power, which should in that instance suspend the lawful authority of King, Lords, and Commons," would amount to a treasonable conspiracy; but he expressed a doubt whether such an offence could be inferred from "a design to collect the people together against the legislative authority of the country for the purpose, not of usurping the functions of the legislature, but of overawing the Parliament, and so compelling the King, Lords, and Commons in Parliament assembled to enact a law."

The opinion of the judges on the appeal of O'Connell and others in the House of Lords, in 1844(*a*), goes far to remove the doubt just mentioned, and to show how far the law tolerates large political assemblies which do not commit actual violence. The appellants had assembled enormous meetings in Ireland, which O'Connell and some of the other appellants had addressed in political speeches relating to the Union of Great Britain and Ireland, and other grievances. The appeal was from a judgment of the Court of Queen's Bench in Ireland, where the appellants had been convicted upon an indictment for conspiracy. Upon a reference from the House of Lords, the English judges gave a unanimous opinion as to the sufficiency of the several counts of the indictment. Some of the counts accused the appellants of an agreement to excite the Queen's subjects to discontent with and disaffection to the Government and laws of the realm, and to stir up ill-will and hostility between different classes of the Queen's subjects, particularly between the people of Ireland and the people of England. The judges held such an agreement to be a conspiracy. Other counts charged the appellants with agreeing to assemble large numbers of persons for the purpose of procuring changes in the Government and laws, "by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of the great physical force at

(*a*) 11 Clark and Finnelly's Reports, 155.

such meetings." The judges held these counts insufficient, because it was not shown on whom the intimidation was intended to operate, nor how the physical force was threatened to be used. But a count charging an agreement by similar means to intimidate the *Houses of Parliament*, and thereby procure alterations in the law, was held to be a sufficient charge of conspiracy.

The last class of laws affecting political societies and meetings here to be considered, are the various statutes respecting such bodies passed in the reign of George III. By 37 Geo. III. c. 123, extended by 52 Geo. III. c. 104, it is rendered a felony to administer any oath intended to bind the persons taking it in any mutinous or seditious purpose, or disturb the public peace, or to be of any association, society, or confederacy formed for such a purpose. Another statute, 39 Geo. III. c. 79(*a*), prohibits the societies of United Englishmen, etc., and the London Corresponding Society, and also every society of which the members are required to take illegal oaths, or wherein the name of any member is kept secret, or there are secret committees or officers, or where the society is composed of branches acting separately, and having distinct officers or delegates elected to act for each branch. Exceptions are made in favour of societies for religious and charitable purposes, and lodges of Freemasons. By 57 Geo. III. c. 19, s. 25, every society or club that shall elect or employ any committee, delegate, representative, or missionary to meet

(*a*) A temporary Act, 36 Geo. III. c. 8, was passed in 1796, in a time of great political ferment, prohibiting political meetings of more than fifty persons without previous notice given by seven householders in some newspaper, etc.; and places for lectures or debates concerning supposed public grievances, where money was paid for admission, were, unless previously licensed, deemed to be disorderly houses. The Act was to continue for three years, and until the end of the then next session of Parliament. One of the sections of the Act 39 Geo. III. c. 79, referred to in the text, renders every place for lecturing, debating, or reading newspapers or books, where money shall be paid for admission, a disorderly house within 36 Geo. III. c. 8, just cited. But as that Act has expired, the section in question in the later Act appears to be inoperative.

or communicate with any other society or club, or any committee thereof, or induce any persons to become members, is prohibited, and it is rendered penal to correspond with or support such a society. Recently, by 9 & 10 Vict. c. 27, s. 9, friendly societies have been exempted from the operation of these last two Acts just mentioned.

4. *The Press.*—The history of the Press has been so often written, that it will not be necessary in this place to narrate it, except in a few particulars which illustrate the now-established principles of English law on this important subject. Restraint of the liberty of publishing books commenced even before the invention of printing, and has been continued to be exercised by various powers in the state almost uninterruptedly to very recent times. The earliest crusades against books were directed against those of a religious character, as in the second year of Henry IV., A.D. 1400, when the statute (*a*) *de heretico comburendo* was passed, which prohibited the making or writing of any book contrary to the Catholic faith; and all persons having such books were commanded, under severe penalties, to give them up to their diocesans. And again, in 1 Hen. V., a severe statute (*b*) was passed for extirpating the heresy of the Lollards; and, by constitutions made in convocation of the prelates and clergy of the province of Canterbury, twelve inquisitors were appointed to search out heretics, with all Wickliffe's books (*c*). Subsequently to the introduction of printing into England, similar attempts were made to restrain the circulation of the printed books of Tindal and other Protestants. In 1525, Wolsey was appointed by Henry VIII. to the office of Grand Inquisitor, and instituted an active search for prohibited books (*d*). In 1527, in the presence of Wolsey, a large number of printed Bibles were burned at

(*a*) 2 Hen. IV. c. 15. (*b*) 1 Hen. V. c. 7.

(*c*) Foxe's Acts and Monuments of matters most special and memorable happening in the Church, vol. i. p. 596, fol. ed.

(*d*) Froude's Hist. of England, vol. ii. p. 40.

St. Paul's Cathedral in London. Printers and booksellers were, by statute 34 and 35 Hen. VIII. c. 1, prohibited from uttering Tindal's translation of the Bible, and all books comprising unauthorized religious doctrines. By the same statute no person was to retain books against the Sacrament, etc.; and women, serving men under the degree of yeomen, and others, were prohibited from reading the New Testament in English.

Religious books continued to be burned publicly during the next reign of Edward VI., but it does not appear that any general regulation for repressing *political* publications was made until the reign of Mary. In June, 1558, a Royal proclamation recites the publication of divers "books filled with heresy, sedition, and treason," by which God is dishonoured, and encouragement is given to disobey lawful princes; and it is declared that whosoever shall be found to have such books, or finding them shall not burn them, shall be "taken for a rebel, and shall without delay be executed for that offence according to the order of martial law"(*a*). November 16 of the same year, a bill for the restraint of the Press was brought into the House of Commons, but was prevented from passing by the death of the Queen on the following day(*b*).

We have seen in a former part of this chapter, that during the times of the Tudors, express words were in certain cases made by statutes overt acts of treason. Many of the same statutes have analogous provisions with respect to writing and printing. The Act 1 & 2 Ph. & M. c. 10, makes any attempt during the marriage of the King and Queen by writing or printing to depose the King, etc., high treason. A similar provision is contained in the statute 1 Eliz. c. 5. By a later statute of Elizabeth (22 Eliz. c. 2), the writing, printing, or publishing, of any book containing seditious and slanderous matter to the defamation of the Queen, is made

(*a*) Strype's 'Ecclesiastical Memorials, relating chiefly to Religion and the Reformation of it,' vol. iii. part 2, ch. 63.

(*b*) Parry's 'Parliaments,' 213.

a felony. This law received from the judges an interpretation which made it a very powerful instrument of restraining political discussion. John Udal, a Puritan minister, was convicted under this statute, in 1590, for publishing a book containing some animadversions on the bishops. The judges held that as the bishops were nominated by the Crown, this was an offence against the Queen personally, and therefore within this statute(*a*).

This prosecution, and many others in the reign of Elizabeth, were instituted by the Star Chamber, which was active in restraining the publication of obnoxious books. By Star Chamber decrees of that reign, the printing of pamphlets and treatises was prohibited until they had been first *seen and allowed;* and it was further directed that no printing should be used anywhere but in London, Oxford, and Cambridge(*b*).

Thenceforward to the time of its dissolution in the reign of Charles I., the Star Chamber had, as a principal part of its jurisdiction, the licensing of books, and the control of the press, and exercised a legislative power in all matters relating to the subject. This usurpation of the powers of Parliament did not pass without censure there, though the Houses of Parliament themselves indulged in attempts against the liberty of the press(*c*). In 1629 (4 Car. I.), complaint was made in the House of Commons that there

(*a*) 1 State Trial, 1271. The judges expressly told the jury that they were to consider merely whether the prisoner was author of the book, and not the character of the book. This is a very early instance of a doctrine which has been one of the most effectual means of withdrawing the liberty of the press from the protection of juries.

(*b*) 1 State Trials, 1265; the Order of the Star Chamber of 28 Eliz., is recited in the decree of the Star Chamber concerning printing, 11th July, 1637. (Rushworth's Historical Collections, part 2, vol. ii. Appendix, p. 306).

(*c*) In 1624, and again in 1626, the House of Commons resolve to present Bishop Montague to the House of Lords as a public offender, on account of his books containing Arminian doctrines. (4 Hatsell, 133, and note.) In 1628, Dr. Manwaring, for publishing sermons entitled 'Religion and Allegiance,' was, at the charge of the House of Commons, censured by the Lords, and disabled from ecclesiastical preferment. Montague and Manwaring both received pardons from Charles I. (1 State Trials, 335.)

were then no licensers of books but the Bishop of London and his chaplains, who often refused licences unjustly. Thereupon the learned Selden said, "There is no law to prevent the printing of any book in England, only a decree of the Star Chamber. Therefore, that a man shall be fined and imprisoned, and his goods taken from him, is a great invasion on the liberty of the subject"(*a*).

Prosecutions in the Star Chamber on account of books were more frequent in the reign of Charles I. than at any other time. In 1630, Dr. Alexander Leighton, for publishing "an appeal to Parliament, or plea against prelacy," suffered, by sentence of the Star Chamber, a very cruel corporal punishment(*b*). In 1632–3, Prynne, one of the most learned constitutional writers which this country has produced, suffered a similar fate for his 'Histrio-Mastix,' or book against stage-plays, which was suspected to be levelled against the practice of the Court and the example of the Queen, and he was barbarously tortured and mutilated. In 1637, during his imprisonment under his first sentence, another information was exhibited against him, and a second cruel sentence pronounced by the Star Chamber, when he had Dr. Bastwick and Burton for his companions in suffering. At this time the usurped power of the Star Chamber was carried to its highest pitch. They appointed licensers, prohibited books, and inflicted penalties absolutely without control. They dignified one of their officers with the name of the "Messenger of the Press," who, by a decree of 1637, was empowered to search in all places where books were printing, in order to see if the printers had a licence; and if upon such search he found any books which he suspected to contain any matter in them "contrary to the doctrine and discipline of the Church of England, or against the State and Government," he was to seize them, and carry them before the Archbishop of Canterbury or Bishop of London(*c*).

(*a*) Parry's 'Parliaments,' 330. (*b*) 3 State Trials, 562, 711.

(*c*) Decree of the Star Chamber, dated 11 July, 1637, sect. 26. (Rushworth's Historical Collections, vol. ii. part 2, Appendix, p. 306.)

But the illegal power of the Star Chamber was now nearly at an end. The prosecutions just mentioned took place during the long discontinuance of Parliaments by Charles I. Shortly after he had summoned the Long Parliament in 1640, Bastwick, Burton, and Prynne petitioned the House of Commons for relief, and their petitions were referred to the Committee appointed to inquire into the proceedings of the Star Chamber and High Commission Court. The petitioners were in prison, according to their sentences; and the House, unwilling to disregard the sentences of a supreme court, had some difficulty in sending for them. But this difficulty was removed by the consideration that the sentences were illegally executed, for the petitioners had been sentenced to imprisonment in London, whereas they had been sent to remote parts of the kingdom. The Speaker therefore issued warrants to bring them in safe custody to London. The House, on the report of its Committee, resolved that the proceedings against the petitioners, and their sentences, were illegal, and that they were entitled to damages from their judges. Similar resolutions were adopted with respect to Dr. Leighton and Lilburn, who had suffered from Star Chamber sentences for libels(*a*). In the same year, 1640–1 (as we have seen)(*b*), the Star Chamber was dissolved by statute.

But the Long Parliament, though it thus rendered justice to the victims of the persecution of the press by the Star Chamber, was by no means disposed to leave the press unfettered. The Long Parliament, both before and after its rupture with Charles I., was at least as hostile to the press as any of its former enemies had been. The proceedings of this Parliament were criticized in pamphlets and books innumerable; to which the Houses replied by burning them, and punishing as far as possible the authors and printers. This warfare against the press was incessant, and was carried

(*a*) 3 State Trials, 387 *n*, 1342.

(*b*) *Ante*, Ch. X. p. 240. The Act received the Royal assent July 5, 1641. (Parry's 'Parliaments,' 359.)

on with equal vigour by the Lords and Commons. Various ordinances of this Parliament were made for the licensing of books; these ordinances were founded principally on the model of the Star Chamber decree of 1637, and under these ordinances licensers were appointed. In order to more effectually suppress obnoxious books, the Commons had committees, whose particular business it was to examine such books, and report as to measures to be taken respecting them (*a*).

The same system of repression was continued under the Commonwealth (1649 to 1653), and under Cromwell (1653 to 1658) (*b*). The press fared no better after the Restoration. As at the commencement of the reign of Charles II. there was no law subjecting the press to the restraints of the licensing system, recourse was had to the common law courts, for the purpose of punishing the authors and publishers of obnoxious books. At the instance of the Crown,

(*a*) By an Ordinance of the Lords and Commons, anno 1643, cap. 12, the Stationers' Company and certain officers of the two Houses are authorized to search for unlicensed printing presses. (Scobell's Collection of Acts and Ordinances, p. 44.)

The proceedings of the Long Parliament against books and pamphlets were far too numerous to be cited particularly. Brief notices of them are to be found in almost every page of that part of Parry's 'Parliaments' which relates to the Long Parliament. The order of the Lords and Commons in 1643, that no book should be printed without licence, was the occasion of Milton's noble treatise 'Areopagitica; a Speech for the Liberty of Unlicensed Printing.' December 28, 1644, complaint is made in Parliament against John Milton and another for printing frequent scandalous books. (Parry, 441.)

(*b*) See, *inter alia*, an ordinance of Parliament, 1652, entitled "Unlicensed and Scandalous Boks to be suppressed." (Scobell, p. 230.) August 30, 1653, the Council of State is ordered to examine scandalous, seditious, or tumultuous papers or words in derogation of the authority of Parliament (Parry, 511.) October 23, 1656, it is referred to a committee to suppress private presses, to regulate presses, and suppress and prevent scandalous books and pamphlets. (Parry, 518.)

One of the most remarkable trials of this period was that of Lieut.-Col. Lilburne for high treason, under the Act of the Commonwealth Parliament in 1649, which made it treason to publish by writing or words that the Government was tyrannical. Lilburne was acquitted, and his acquittal occasioned great popular rejoicings. (4 State Trials, 1279.)

or of the Houses of Parliament, prosecutions were instituted for the purpose of bringing the offenders under the operation of the laws relating to treasonable and seditious writings. The first example of such prosecutions is an illustrious one. In June, 1660, the House of Commons order "Mr. Attorney-General to proceed against John Milton in respect of two books, 'Pro Populo Anglicano Defensio,' and 'Portraiture of his Sacred Majesty'"(*a*). In 15 Car. II., A.D. 1663, John Twyn was tried for treason, the overt act being the printing a treatise in favour of the doctrine that the people may lawfully depose unjust kings. Twyn refused to give up the name of the author, and was convicted and hung. Others, for writing, publishing, and selling scandalous books, were nearly at the same time indicted for misdemeanour, and received sentences of fine, pillory, and imprisonment(*b*). It is observable that there are no cases of seditious libel in the Common Law Courts before the time of Charles II.; the explanation probably being, that during the existence of the Star Chamber the Attorney-General, for good reasons, preferred to proceed there(*c*).

In 1662, an Act, 13 & 14 Car. II. c. 33, was passed for preventing the printing of *unlicensed books*. This Act empowered the Secretary of State(*d*) to issue warrants to search for and seize unlicensed books. This Licensing Act expired in 1679. In the first year of James I., A.D. 1685, it was revived, to continue in force for seven years(*e*). After the Revolution, when the Act had just expired, A.D. 1692, it was revived by 4 & 5 W. & M. c. 24, s. 14,

(*a*) Parry's 'Parliaments,' 535.

(*b*) 6 State Trials, 514, 702; 7 State Trials, 934.

(*c*) Per Lord Chief Justice Camden, in his judgment in Entick *v.* Carrington. (19 State Trials, 1045.)

(*d*) The Court of King's Bench also attempted to exercise a power of prohibiting the publishing of books. One of the articles of the impeachment of C. J. Scroggs was founded on a rule of that court, prohibiting the publication of the 'Weekly Pacquet of Advice from Rome;' which rule the House of Commons resolved to be illegal, and an assumption of legislative power. (8 State Trials, 198.)

(*e*) 1 James I. c. 17, s. 15.

to continue one year, and to the end of the then next session of Parliament. The Act thus continued expired in 1694, and was never again revived, though frequent attempts were made by Government to revive it in the subsequent part of the reign of William III., and for a quarter of a century later the question of the revival of licensed printing was repeatedly agitated in Parliament(*a*).

But though the system of licensing books ceased in 1694, two restraints of the freedom of the press continued till long afterwards. One of these was the summary jurisdiction of the Houses of Parliament; the other, the severe operation of the laws of libel.

It has been shown in a previous chapter that the Houses of Parliament exercised a summary jurisdiction to punish, as breaches of privilege, the authors, printers, and publishers of writings deemed derogatory to the honour and character of the House or its members. So early as the reign of Queen Elizabeth, A.D. 1580, the House of Commons exercised this jurisdiction by committing to the Tower, fining, and expelling one Hall, a member, for publishing a book against the authority of the House. Many other precedents of the same kind are to be found, both before and after the Revolution. Those of the last and present century relate principally to newspaper reports of proceedings in Parliament; and until 1771, when the right of publishing such reports was practically established(*b*), the publishers of newspapers were frequently committed to custody for reports of Parliamentary proceedings.

Another way in which the summary jurisdiction of Parliament was exerted against the press, was by orders for the

(*a*) When the Licensing Act expired, at the close of the reign of Charles II., the twelve judges were assembled by the King's command to discover whether the press might not be as effectually restrained at common law as it had been by that statute. They resolved that it was criminal at common law, not only to write public seditious papers and false news, but likewise to publish any news without a licence from the King, though it was true and innocent. This resolution of the twelve judges was condemned by Lord Chief Justice Camden, in Entick *v.* Carrington, as illegal. (19 State Trials, 1071.)

(*b*) See *ante*, p. 147.

public burning of offending books. The proceedings of the Long Parliament under Charles I. and the Commonwealth, contain repeated instances of orders for the burning of books. The practice of ignominiously burning books is (as we have seen) as old as the time of Wolsey, and it continued till far into the eighteenth century (*a*).

In the present century, one or two instances have occurred of the exercise of the summary jurisdiction of the House of Commons on account of offensive writings. In 1810, Mr. Gale Jones was committed to Newgate for publishing an offensive placard, announcing for discussion in a debating society the conduct of two members of Parliament. Sir Francis Burdett was sent to the Tower for publishing an address to his constituents, denouncing this act of the House, and denying its right of commitment. Twenty years later, both these offences would probably have been disregarded, or visited with censure only. Again, in 1819, Mr. Hobhouse was committed to Newgate, for violent, if not seditious, language in a pamphlet. A few years afterwards, such an offence, if noticed at all, would have been remitted to the Attorney-General and the Court of Queen's Bench (*b*).

Parliamentary proceedings against authors have not been confined to the exercise of the summary jurisdiction of the two Houses of Parliament. Thus, the proceedings against the notorious Dr. Sacheverell, in 1710, on account of sermons published by him, were conducted by way of impeachment. Burnet says that the then Solicitor-General and others thought the short way of burning the sermons, and keeping Sacheverell in prison during the session, was the

(*a*) Among books burned in the last century by order of Parliament were —Defoe's 'Shortest Way with the Dissenters,' in 1703; Dr. Sacheverell's Sermons were ordered by the House of Lords to be burned in 1710; a printed paper, entitled 'Constitutional Queries, earnestly recommended to the serious Consideration of every true Britain,' was burnt in 1751, by order of the Lords and Commons jointly. (3 Smollett's Hist. of Eng., book iii. ch. 1.)

(*b*) 1 May's Constitutional History, 435.

better method; but the more solemn way of impeachment was unhappily chosen (*a*). He was impeached of high crimes and misdemeanours, the substance of the charge being a seditious intention to subvert the Protestant succession, and to asperse the memory of William III. and traduce the Revolution. The House of Lords adjudged that he should be enjoined not to preach for three years, and that his sermon should be burned publicly by the common hangman (*b*).

For reasons which have been already pointed out, libel cases were first brought into the courts of law after the Restoration. At that time Parliament adopted a practice of causing the authors of obnoxious books to be prosecuted before the courts of law. This method of trial enabled the persons prosecuted to defend themselves before juries; but, as we shall presently see, that protection was rendered nearly ineffectual by certain principles then maintained by the judges respecting libels. The trials were instituted either by order of the House, directing the Attorney-General to prosecute, or by address to the Crown to direct such prosecutions; the former course being generally observed with respect to offences against the House or its members, the latter with respect to offences of a more general character against the public law of the country (*c*).

The first instance of a prosecution for libel directed by the House of Commons was that just mentioned, which was instituted against Milton, a few weeks after the Restoration. Similar prosecutions were instituted at intervals from that time down to nearly the end of the last century. One of these trials, that of Stockdale, in 1789, by its result contributed in an important degree to the liberation of the press. Stockdale was prosecuted by the Attorney-General, in compliance with an address from the House of Commons to the King, for publishing a pamphlet containing severe strictures on the manner in which the House of

(*a*) Burnet, Hist., A.D. 1710.
(*b*) 15 State Trials, 1. (*c*) May, 'Law of Parliament,' 88.

Commons prosecuted the impeachment of Warren Hastings. The jury acquitted Stockdale. This trial Lord Kenyon, who presided at it, referred to upon a later occasion, as a remarkable instance of the protection afforded by trial by jury where the prosecution has been instituted by the authority of the House of Commons. He remarks that Stockdale came "an individual, to resist a prosecution so carried on; he was not borne down by the weight of the prosecutors; the jury found that the cause came to them without any impression whatever; they judged the case, not because the House of Commons had judged of it, adopting their ideas that the pamphlet was a libel and punishable, but they assumed the right to judge of it by themselves. They asserted that right finally, and in that case certainly they declared the party whom the House of Commons accused to be not guilty" (*a*).

Besides prosecutions at the instance of Parliament, a vast number of other informations for seditious libel were instituted by the Attorney-General *ex officio* during the latter half of the last century. The occasions of these libels were discontent with the arbitrary government of the earlier ministers of George III., the state of Parliamentary representation, and latterly, the contagious influence of the French Revolution, which occasioned great political ferments in this country, and the organization of dangerous political associations. Some of the most remarkable of these informations were—that in 1763, against John Wilkes, M.P., for a seditious libel in the 'North Briton,' No. 45; those in the years 1769 and 1770, against the printers and publishers of the letter of Junius to the King; that against John Horne, in 1777, for a libel encouraging the revolt of the American colonies; that against Thomas Paine, in 1792, for libels contained in his 'Rights of Man;' and in the two or three years following, very numerous libels, inspired partly by sympathy with the French Revolution, and partly

(*a*) Lord Kenyon's summing up on the trial of John Reeves for a libel on the English Constitution, A.D. 1798. (26 State Trials, 590.)

by discontents with the state of the representation, were prosecuted in England, Scotland, and Ireland (*a*).

A change in the law of libel in 1792 had a most important effect upon such trials. Previously to the passing of the Libel Act of that year, the judges uniformly held, that upon trial of an indictment, or information for libel, the truth or falsehood of the paper incriminated was not material, and was not to be left to the consideration of the jury. In a civil action for libel the defendant might plead by way of justification that the libel was true; and as between him and the plaintiff seeking damages for a private injury, the truth of the libel was a bar to the action for damages. But the intention charged upon the defendant in *criminal* proceedings for libel was generally a matter of form requiring no proof. The crime, it was said, consisted in publishing a libel; and a criminal intention in the writer was no part of the definition of the crime of libel at common law. He who scattered firebrands, arrows, and death, was *ed ratione* criminal. It was not incumbent on the prosecutor to prove his intent, and on his part he was not to be heard to say,—Am I not in sport? This was the language of the judges in answer to questions proposed to them by the House of Lords, pending the discussion of the Libel Act of 1792 (*b*).

On these principles the judges had always on trials for seditious libel directed the juries to consider merely whether the publication of the libel was proved, and whether the averments and innuendos (*c*) inserted in the indictment, in

(*a*) State Trials, vols. xix. xxvi. (*b*) 22 State Trials, 295.

(*c*) An innuendo may be defined to be an averment which explains the meaning of the defendant's publication by reference to facts previously ascertained by averment or otherwise. (Starkie, 'Law of Libel,' 2nd ed. vol. i. p. 418.)

"An innuendo is an averment that such a one means such a particular person, or that such a thing means such a particular thing; and when coupled with the introductory matter it is an averment of the whole connected proposition, by which the cognizance of the charge will be submitted to the jury, and the crime appear to the court." (Per Lord Chief Justice Grey, trial of John Horne for libel, 20 State Trials, 793.)

order to show to what persons and things the different parts of the libel were intended to apply, were proved. The question of the criminal nature of the libel itself was held to be a question for the judges only. Long before this state of the law was altered, juries had frequently resisted the restrictions which it imposed upon them. Thus, in the case of Woodfall, prosecuted in 1770, for publishing the letter of Junius to the King, the verdict returned was "guilty of printing and publishing *only*." The court held that this word "only" could not be disregarded, and directed a new trial(*a*). At length the Libel Act of 1792 (32 Geo. III. c. 60) passed after much discussion and the failure of previous bills for the same purpose, greatly enlarged the functions of the jury in cases of "indictment or information for the making or publishing any libel." The Act provides that in such cases the jury may give a verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required to find a verdict of guilty merely on proof of the publication of the paper charged to be a libel, and of the sense ascribed to the paper in the information or indictment.

The beneficial operation of the Libel Act is perspicuously stated in a note to Erskine's speeches as follows:—"The Libel Bill does not confer upon the jury any jurisdiction over the law, inconsistent with the general principle of the constitution: but, considering that the question of libel or no libel is frequently a question of fact rather than of law, and in many cases of fact and law almost inseparably blended together, it directs the judge, as in other cases, to deliver his opinion to the jury upon the whole matter, including of course the question of libel or no libel, leaving them at the same time to found their verdicts upon such whole matter, so brought before them, as in all other criminal cases. . . . Before the statute, it was not difficult for the most abandoned and profligate libeller, guilty even of the most malignant slander upon private men, to connect

(*a*) 20 State Trials, 921.

his cause with the great privileges of the jury to protect innocence. Upon the judge directing the jury, according to the old system, to find a verdict of guilty upon the fact of publication, shutting out altogether from their consideration the quality of the matter published, ingenious counsel used to seize that occasion to shelter a guilty individual under the mask of supporting great public right; and juries, to show that they were not implicitly bound to find verdicts of guilty upon such evidence alone, were too successfully incited to find improper verdicts of acquittal: but since the passing of the Libel Act, when the whole matter has been brought under their consideration, when the quality of the matter published has been exposed when criminal, and defended when just or innocent, juries have listened to the judge with attention and reverence, without being bound in their consciences, except in matters of abstract law, to follow his opinion"(a).

With regard to *defamatory* libels affecting private persons, there are two remedies; the one civil, by "action on the case," which is to repair the party in damages for the injury done him; the other criminal, by indictment for the public offence, for every libel has a tendency to the breach of the peace. In the civil action it has always been considered requisite to show the libel to be false as well as scandalous; for if the charge be true, the plaintiff had received no private injury, and has no ground to demand a compensation for himself, whatever offence it may have been against the public peace; and therefore upon a civil action it has always been allowable to plead the truth of the accusation in bar of the suit. But in a criminal prosecution, the tendency which all libels have to create animosities and disturb the public peace was, until recently, the whole that the law considered. And therefore in such prosecutions the only points inquired into were, firstly, the making or publishing the libel; and, secondly, whether the matter

(a) Speeches of the Hon. Thomas Erskine, collected by Ridgway, vol. i. p. 384; note to trial of the Dean of St. Asaph.

were criminal; and if both these points were against the defendant, the offence against the public was considered complete; but the jury was competent to decide as to the criminality of the alleged libel(*a*). But a modification of these rules has been recently adopted by the Legislature; and now, by 6 & 7 Vict. c. 96, s. 6, on the trial of any indictment or information for a defamatory libel, the truth of the matter charged may be inquired into, but shall not amount to a defence, unless it were for the public benefit that the matter charged should be published. To entitle the defendant to give evidence of the truth of the matters charged, he must plead their truth, and that it was for the public benefit that they should be published; and if after such plea the defendant is convicted, the court may in pronouncing sentence consider whether the guilt of the defendant is aggravated or mitigated by the plea(*b*).

A defendant is in no case allowed to prove the truth of a *seditious* libel in justification of its publication, nor even in extenuation of punishment(*c*). The statute just referred to applies only to private and personal libels.

In certain cases, the publication of matter which in ordinary circumstances would be libellous is privileged. Thus we have already seen that by a modern statute such privilege belongs to documents published by order of the Houses of Parliament(*d*). A member of Parliament may justify the publication of matters alleged to be libellous, by showing that it formed part of a speech delivered by him in Parlia-

(*a*) 3 Blackstone, Comm., 126.

(*b*) By section 2 of the same statute, in an action for libel contained in a newspaper or periodical publication, the defendant may plead that it was inserted without malice or gross negligence, and that an apology has been offered to be published. By section 1, the defendant may prove the offer of apology in mitigation of damages.

In order to ascertain the persons liable for libels in newspapers, various particulars respecting the printers, publishers, and proprietors of them are required to be registered at the Stamp Office, and to be published in the newspapers, 6 & 7 Will. IV. c. 76. The compulsory payment of stamp duties on newspapers is abolished by 18 & 19 Vict. c. 27.

(*c*) R. *v.* Burdett, 4 B. and Ald. (*d*) *Ante*, Ch. IX. p. 135.

ment; but this extends only to the speaking in the House; for if he afterwards republish his speech, he is amenable for it in the same manner as any other person(*a*). The publication of matter alleged to be libellous, may be justified by its being contained in regular proceedings in a court of justice, or by its being a fair report of a trial; but this is not an excuse in all cases, for it may be necessary in the course of a trial to read matter of a scandalous, blasphemous, or indecent nature, which it would not be lawful to republish in print. The same rule applies to reports of proceedings before magistrates, and particularly to *ex parte* proceedings(*b*).

(*a*) Starkie, Law of Libel and Slander, vol. ii. p. 245, 2nd ed.

In 1795, the Earl of Abingdon was committed to the King's Bench Prison, as part of the punishment for publishing in print a libellous speech in Parliament. In 1813, Mr. Creevy was convicted in the King's Bench, and fined £100, for the like offence, and the House of Commons refused to listen to his complaint against the Court of King's Bench for breach of privilege. (1 Hatsell, 203 *n.*, 206 *n.*)

(*b*) Starkie, vol. i. p. 263. Courts of Record have power to prohibit the publication of the proceedings pending a protracted trial or series of trials, and to punish disobedience to such prohibition. Thus, where at the instance of a prisoner the witnesses for the prosecution were directed to withdraw from the court, in order that they might not be apprised of what was passing on the examination of others, and the publishers of newspapers were admonished not to publish the proceedings pending the trial, a publisher disobeying the admonition was fined, and upon argument, the Court of King's Bench held that the fine was properly imposed. R. *v.* Clement, 4 Barn. & Ald. 218.

BOOK II.

JUDICATURE.

BOOK II.—JUDICATURE.

CHAPTER I.

DIVISIONS OF THE JUDICATURE.

The Legislative power having been now treated of, we come to the consideration of the second principal division of our subject—the Judicature. A complete account of the administration of justice in this kingdom is not to be looked for in a compendium like the present, for so great is the diversity of courts of justice, of their modes of procedure, and the kinds of law which they administer, that it is only by study of special treatises that even the elements of our judicial system can be understood. In the general survey which will be here attempted, it is not intended to enter into any details of judicial practice which do not appear to be of general constitutional importance; but our principal object will be to trace the connection between the several parts of the judicature and the means by which the power of each is maintained and restrained within its constitutional limits.

In order to simplify as far as possible a subject of great complexity, it will be necessary to preface a few words as to the arrangement of it which will be here adopted. The following method of dividing it, though not strictly scientific, appears to have the advantages of perspicuity and simplicity. We propose, in the first place, to consider the origin of Courts of Law in general; and next, the nature of judicial

offices, and the general course of procedure in Courts of Law. We shall then proceed to review the means by which the authority of the judicature is maintained, and subsequently give an account of particular Courts of Law, considering, first, those superior courts which have jurisdiction throughout the country, or power to review the proceedings of inferior courts, and then the inferior courts, which have jurisdiction confined to local limits.

CHAPTER II.

ORIGIN OF COURTS OF LAW.

ADOPTING the definition given in a preceding chapter(*a*), the essential attribute of the judicature is the power of authoritatively interpreting the laws. A court is defined by Sir Edward Coke to be "a place where justice is judicially ministered." Authority to determine the interpretation of laws is given by the constitution to the judges in regularly constituted courts of justice, though in some few instances a limited power of interpreting the laws is allowed to be exercised elsewhere than in courts of justice, but the excepted instances are comparatively insignificant. Thus there are cases in which, in order to save delay and expense, administrative officers are allowed to settle doubts respecting the interpretation of a few clauses in Acts of Parliament of no general importance(*b*). The law also recognizes, in civil cases, the authority of arbitrators to determine questions of law as well as of fact referred to them by private agreement, but in this latter case the jurisdiction is founded on the private agreement. Again, in eleemosynary corporations—hospitals and colleges—founded by private persons,

(*a*) *Ante*, Book I. Ch. I.

(*b*) The following are examples. By 18 & 19 Vict. c. 27, s. 6, questions as to privileges of periodicals to transmission by post are to be decided by the Postmaster-General. By the Acts relating to the Charity Commissioners for England and Wales, a limited jurisdiction is given to the Commissioners to make orders for the appointment and removal of trustees, and in certain other cases which occasionally involve questions of law. (See 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112.)

"visitors" have, by appointment of the founders or by usage, authority to judge upon the statutes of those institutions, and such determinations are not subject to appeal in Courts of Law (*a*). But with these and a few other peculiar exceptions, it is a general principle of our Constitution to give authority to determine the interpretation of the laws only to judges in lawfully constituted Courts of Justice.

The sovereign is said to be the fountain of justice, *fons justitiæ*, and in that capacity has the right of erecting courts of judicature (*b*), though the right is subjected to many restrictions by Acts of Parliament. All jurisdictions of Courts of Justice are, either mediately or immediately, derived from the Crown; their proceedings run generally in the name of the Sovereign, and are executed by ministerial officers of the Crown. It is probable that, in very early times, the King in person often heard and determined causes between party and party; but at present, by the long and uniform usage of many ages, the whole judicial power is delegated to the judges in their several courts, which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the Crown itself cannot alter, except by Act of Parliament (*c*). The principle that the King is the fountain of justice extends to the highest tribunals, as well as those of inferior jurisdiction (*d*). In the Saxon and Roman periods, the King

(*a*) 1 Blackstone's Comm., 483.

If a visitor of a college in one of the universities refuse to exercise his visitatorial office by receiving or hearing an appeal, the Court of King's Bench will grant a *mandamus* to compel him. But if he has heard and decided on it, the Court has no authority to question his judgment. (Frend's case, 22 State Trials, 753.)

(*b*) 1 Blackstone, 267. (*c*) *Ibid.*

(*d*) By the repealed "Act for the Election of Bishops," 1 Edw. VI. c. 2, all processes out of the ecclesiastical courts were required to be in the King's name. By 1 Eliz. c. 1, s. 17, the ecclesiastical jurisdiction is annexed to the Crown. In Bastwick's case, in 1637, the judges certified to the Star Chamber that ecclesiastical process need not be in the King's name, or with his style. (3 State Trials, 714.)

appears to have actually sat with the peers in the discussion of causes in Parliament. Edward I. seems to have frequently presided in Parliamentary causes; but where the King was not actually present, his consent to the judgment of the House of Lords was assumed. Even to this day the writ of error in Parliament commands the Chief Justice to bring up the record before "Her Majesty in Parliament." So the Court of Queen's Bench is supposed to be peculiarly *coram Rege*. Yet when King James I. attempted to preside there, he was told by his justices that he could not deliver an opinion(*a*).

The courts of law are created by Parliament or letters-patent, or subsist by prescription; and these are the only ways in which a court of judicature can exist(*b*). The administration of justice in Saxon times was essentially local, rising from the smaller jurisdiction gradually to the higher. The smallest jurisdiction was that of each township. Next in order was the Hundred Court, which was held every month, and was composed of all the thanes and landlords whose demesnes were included within the boundaries of the "hundred." The County Court, or Schyremote, was the court of the next greater jurisdiction, in which the bishop of the diocese in which the county was situated and the ealdorman presided, and respectively declared ecclesiastical and municipal law(*c*). The supreme court of justice was the Wittenagemote, or general council, assembled at several periods of the year.

But this constitution became greatly changed at the Conquest. The administration of justice became centred in the King as the foundation of justice; and this system of centralization, connected with the principles of feudalism, was elaborated, in the course of centuries, to a high state of perfection, so that it in a great measure absorbed the ancient local jurisdictions, and prevented the establishment of new.

(*a*) 12 Coke's Rep. 64. (*b*) 3 Blackstone, 26.

(*c*) 'Rise and Progress of the English Commonwealth, Anglo-Saxon Period,' by Sir Francis Palgrave, vol. i. pp. 79, 98, 117.

The Conqueror established in his own hall a constant court, called by ancient writers *Aula Regis* or *Aula Regia*, composed of the King's great officers of state, assisted by the King's justiciars, or justices, and by the greater barons, and presided over by the Chief Justiciar, who was the principal minister of state. This court had general jurisdiction, both civil and criminal. At the same time the ecclesiastical became separated from the civil jurisdiction. The Saxon laws were overborne by the Norman justiciaries, and the county courts fell into disregard; the bishops withdrew from them; and, by charter of the Conqueror, suitors in spiritual causes were required to appear before the bishops only (*a*). But by Constitutions adopted at a great council of prelates and barons, at Clarendon, in 1165 (10 Hen. II.), the final appeal in ecclesiastical causes was from the archbishop to the King, by which provision the power of the Pope and the clergy was checked, and the exemption from the secular jurisdiction which they claimed was considerably narrowed (*b*).

Another important change in the judicature which is attributed to the period just referred to, was the institution of the offices of Justices in Eyre (*in itinere*), the King having divided the kingdom into circuits, and commissioned the newly constituted judges to administer justice and try writs of assize in the several counties. These justices in eyre are said to have been instituted by Henry II., in 1184 (*c*). They were itinerant judges, who held pleas civil and criminal throughout the kingdom, usually every seven years (*d*).

The institution of trial by jury, for the determination of matters of fact separately from matters of law, is referable to the time of Henry II.; but the jury then, and long afterwards, was composed of *witnesses*, as will be explained more fully in a subsequent chapter.

The next principal epoch in the history of the adminis-

(*a*) 3 Blackstone, 62.

By 52 Hen. III, c. 10, archbishops, bishops, abbots, priors, earls, barons, and religious men and women, are exempted from attending the sheriff's Tourns, except where for some cause their appearance is specially required.

(*b*) 4 Blackstone, 422. (*c*) 3 Blackstone, 73. (*d*) *Ibid.* 59.

tration of justice in England, was the enactment of the Great Charter of John, and its confirmation by Henry III., A.D. 1225. The Charter so confirmed fixed the Court of Common Pleas at Westminster(*a*), that the suitors might no longer be harassed with following the King's person in all his progresses; and at the same time brought the trial of civil causes to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits(*b*). It also prohibited sheriffs and inferior judicial officers from holding *Pleas of the Crown*, which include criminal causes prosecuted in the name of the Crown(*c*), and regulated the time and place of holding inferior courts of justice (the county court, sheriffs' tourn, and court leet), (c. 35). But the most celebrated provision of the Charter was, that no freeman should be imprisoned, deprived, punished, or tried, but by lawful judgment of his peers, or by the law of the land; and the King should not sell to any man, nor deny nor defer to any, justice or right(*d*).

(*a*) "Communia placita non sequantur curiam nostram, sed tenantur in aliquo loco certo." (9 Hen. III. c. 11.) This clause is interpreted by the editor of the third edition of Gilbert's History of the Common Pleas (Introduction) to mean, that the County and Hundred Courts were to be held in some certain place in every county.

(*b*) *Ibid.* c. 12.

(*c*) "Nullus Vicecomes, Constabularius, Coronatur, vel alii ballivi nostri teneant placita corone nostre." (9 Hen. III. c. 17.)

Pleas of the Crown are very many and various, as indictments taken in the county where the King's Bench sits, or removed thither by *certiorari*, etc., *mandamus* for officers, *habeas corpus* for persons committed for criminal causes. (Hale's Discourse concerning the Courts of King's Bench and Common Pleas, 1 Hargrave's Tracts, 361.)

(*d*) "Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre. Nulli vendemus, nulli negabimus aut differemus rectum vel justiciam." (9 Hen. III. c. 29.)

There are various interpretations of the words *nec super eum ibimus, nec super eum mittemus*, as to which see Selden's argument in Sir J. Darnel's case, 3 State Trials, 18; 1 Reeve's Hist. of Law, 249.

The provision above referred to in the Great Charter, by which the Court of Common Pleas was rendered stationary instead of following the person of the King, led to great changes in the judicature. One result was the appointment of a chief and other justices of the Common Pleas, and the consequent curtailment of the jurisdiction of the Chief Justiciar. The authority of the Aula Regis, thus stripped of a considerable part of its power, began to decline during the reign of Henry III. (A.D. 1216–73), and was still further diminished in the reign of his successor, Edward I.(*a*).

The principal epoch in the history of the origin of the courts of justice is certainly the period of Edward I., Edward II., and Edward III. To this period may be referred the establishment of fundamental divisions of the judicial power, which have been maintained with little alteration ever since, in (i.) the three superior courts of law, (ii.) the courts of assize, (iii.) the House of Lords, (iv.) the Court of Chancery, (v.) ecclesiastical courts, (vi.) local courts.

i. *The Three Superior Courts of Law.*—To Edward I. must be given the honour of re-modelling the whole frame of our judicial polity, and of establishing distinct jurisdictions, the principal of which continue to this day. The separation of the Common Pleas from the Aula Regia had begun several years before the Charter of John, and was completed in the time of Henry III. The Courts of King's Bench and Exchequer had also become distinct courts in the time of John, but the limits of their jurisdiction were not settled till subsequently. Both courts interfered with *common pleas,* or suits between private persons, until the reign of Edward I. That King was the earliest who secured to the Court of Common Pleas the jurisdiction of these suits, and

(*a*) "Who has been justly styled our English Justinian; for in his time the law did receive so sudden a perfection, that Sir Matthew Hale did not scruple to affirm that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom than in all ages since that time put together." (4 Blackstone, 425.)

limited the jurisdiction of the King's Bench to pleas of the Crown. In that reign also the jurisdiction of the Exchequer seems to have been for the first time effectually limited to matters of revenue; for previously, notwithstanding the provisions of the great charters of John and Henry III. to the contrary, common pleas were still held in the Exchequer(*a*). This distribution of jurisdictions, by which common pleas were assigned to the Court of Common Pleas, pleas of the Crown to the King's Bench, and causes relating to revenue to the Exchequer; was subsequently subverted by the contrivances and encroachments of the latter two courts, as will be seen in a subsequent chapter.

ii. *Assizes.*—Another great change in the judicature, effected in the same reign, of Edward I., was the institution of *assizes,* and the establishment of a regular system by which, in order to prevent the expense of bringing up the juries to the King's courts at Westminster, it was provided that certain "judges of *nisi prius*"(*b*) should be appointed out of those courts, to make circuits periodically for the trial of issues of fact in causes depending in the courts of Westminster, and then ripe for trial by jury (*c*). This system of assizes and *nisi prius* is founded on the important *statute of Westminster the second,* which provides that from thenceforth two justices sworn should be assigned, before

(*a*) Madox, Hist. of the Exchequer, ch. 19–22. Hale's History of the Common Law, ch. 7. Reeve's Hist. of Eng. Law, ch. 11; 3 Blackstone, 40, 75. Coke speaks of the King's Bench as existing before Magna Charta, but this appears to be an error. (Butler's Co. Litt., 71 *b*, note 2.)

By 28 Edw. I. stat. 3, cap. 4, common pleas shall not be held in the Exchequer. By cap. 5, the Chancellor and Justices of the King's Bench shall follow the King.

(*b*) They were called Judges of Nisi Prius because the issues were to be tried at Westminster at an appointed time, unless before that time (*nisi prius*) the judges of assize came into the county wherein the cause of action arose. (3 Blackstone, 60.) The form of the writ for such trial by jury at Westminster, unless the judges previously came to the particular county, is mentioned in the statute of Edw. I. cited in the text.

(*c*) 3 Blackstone, 72.

whom the civil causes specified in the statute should be tried, and that they should associate one or two of the discreetest knights of the shire into which they should come; that they should take the said assizes but thrice a year at the most, and in every shire before their departure appoint the day of their return. The inquisitions taken at the assizes were to be returned to the court above, and thereupon judgment should be given and enrolled(*a*). The assizes superseded the justices in eyre above referred to, who were a delegation from the Aula Regia, and who made their circuits at first only once in seven years, and subsequently, by Magna Charta, once every year(*b*).

This important statute (c. 29) provides that writs of trespass of *oyer et terminer* (that is, to try felonies) shall not be granted to any justices except the justices of either bench or the justices in eyre, unless it be for a heinous trespass where it is necessary to provide speedy remedy, and our lord the King, of his special grace, hath thought it good to be granted. It is by virtue of this latter provision(*c*) that *special commissioners* of *oyer et terminer* are, upon urgent occasions, issued by the Crown, confined to those offences which stand in need of immediate inquiry or cannot conveniently be tried by the ordinary commissions of *oyer et terminer*.

(*a*) 13 Edw. I. stat. 1, c. 30.

(*b*) The offices of Justices in Eyre were not, however, entirely abolished till the reign of Edward III., and there are several statutes subsequent to that here cited in the text recognizing them. In the reign of Edward III., also, the destruction of the Aula Regia was completed by the abolition of the office of Grand Justiciar. (Spence, Equitable Jurisdiction, vol. i. p. 100, note; 1 Rep. on the Dignity of a Peer, p. 296.)

(*c*) Per Judge Jermin, on the trial of Lilburne for high treason, in 1649. (4 State Trials, 1286.) Lilburne (*ibid.* p. 1276) refers to a passage in Hyde's 'Speeches and Passages in Parliament,' in which he declares that these special commissions came into use in the time of Henry VIII., for suppressing the frequent insurrections from the twenty-seventh to the thirtieth years of that reign, and were afterwards continued in the reigns of Edward VI., Mary, and James I. Special commissions have frequently been issued in modern times. The mode of trial is substantially the same as upon ordinary commissions of Oyer et Terminer.

Another important statute of Edward I. extended the system of assizes above described to trials of criminal causes. By 27 Edw. I. stat. 1, c. 3, it is provided that the justices appointed to take the assizes (civil) in every county, shall, after taking them, proceed forthwith to deliver the gaols of the shires of all the prisoners in them, according to the accustomed mode of gaol deliveries. The power of gaol delivery had previously been given to the justices in eyre; it enabled the judges to try and deliver every prisoner, accused of any crime whatever and in gaol when the judges arrived at the circuit town(*a*).

The system of trial at assizes thus introduced by Edward I. was improved in its details by various statutes of his reign, and those of the two Edwards, his immediate successors. By 27 Edw. I. st. 1, c. 4, nisi prius was to be taken before one of the justices of the court where the suit was depending; and nearly to the same effect is the statute 12 Edw. II. st. 1, c. 3; but this restriction was removed by 14 Edw. III. st. 1, c. 16, which provides that in causes in the King's Bench nisi prius may be granted to a judge of the common bench, and conversely; and that if no judge of either bench come into the county, then nisi prius may be granted before the chief baron of the Exchequer, if he be a man of the law, or in default of the latter the justices of assize, provided that one of them be a justice of either bench or King's serjeant.

iii. *The House of Lords.*—To the same important epoch in the history of English judicature, the reigns of the first three Edwards, must be assigned the general discontinuance of the judicature of the House of Lords except by way of appeal. We have already adverted to the circumstances, that for a considerable period after the establishment of the two Houses of Parliament, a large part of its business consisted in the adjudication of causes over which it held a jurisdiction, original as well

(*a*) 3 Blackstone, 59; 4 Blackstone, 270.

as appellate(*a*); but towards the close of the reign of Edward I., Parliaments relinquished much of their wonted authority as a court of first resort, retaining nevertheless their peculiar jurisdiction as a Court of Review(*b*). We have also seen that at that time, according to Sir Matthew Hale, the Privy Councillors gave their consents in Parliament, though about the time of Edward III. they came to be merely assistants to the Lords in their judicial capacity(*c*).

The statute 14 Edw. III. c. 5, makes the following provision for redressing in Parliament delays in judgments in other courts. After reciting the mischief which had happened by delays in judgments of the Courts of Chancery, the King's Bench, Common Bench, and Exchequer, and justices of Oyer and Terminer, it establishes a court (since fallen into disuse), consisting of a prelate, two earls, and two barons, with the assistance of certain judges, to redress such delays, or in cases of great difficulty to bring the cause before the next Parliament. This court seems to have been established lest there should be a defect of justice for want of a supreme Court of Appeal during any long intermission of Parliament(*d*).

iv. *The Court of Chancery.*—Still confining our attention to the period of the first three Edwards, we have to include in it another change in the judicature, which was attended

(*a*) *Ante*, p. 228. (Hales' Jurisdiction of the Lords' House, ch. 15.)

(*b*) In 18 Edw. I., by an order made in Parliament "in regard to the people who come to the King's Parliament are oft delayed and disturbed, to the great grievance of themselves and of the court, by the multitude of petitions exhibited before the King, of which most could be dispatched by the Chancellor and justices," it is provided that such petitions shall come first to the Chancellor or various judges, who, if they cannot dispatch the petitions, are to bring them to the King and his council. The House of Lords, in 1666, in their controversy with the Commons in Skinner's case, contended that this was a temporary order, and not a perpetual renunciation of all original jurisdiction of the Lords. (6 State Trials, 740.)

(*c*) The present separate jurisdiction of the Privy Council as a court of appeal was a much later institution, probably not earlier than the time of the Tudors. (See *infra*, book ii. ch. 7.)

(*d*) Co. Litt., 71 *b*; Macqueen, 13; 3 Blackstone, 58.

with most momentous consequences in subverting the old feudal laws of property and establishing new laws. At the end of the reign of Edward III., *trusts* of real property were introduced, and with them the separate jurisdiction of the Court of Chancery, which enforced those trusts, though they were totally discountenanced by the Courts of Common Law(*a*). The office of the Chancellor had indeed existed long previously, but his principal duties had been to keep the Great Seal and issue writs(*b*) for the prosecution of suits at Common Law, to advise the King, and to take part with others of the King's judicial officers in hearing of causes in Parliament. The date of the commencement of the separate equitable jurisdiction of the Chancellor has been matter of controversy, and probably cannot be fixed with precision, because that jurisdiction was of very gradual growth. In the reigns of Edward I. and Edward II. we observe unequivocal marks of a jurisdiction in the Chancery in civil cases; petitions addressed to the King being in such cases frequently referred to the Chancellor or Master of the Rolls, for their determination. The latest researches into the antiquities of English law seem to well confirm the opinion of Blackstone above cited, that the establishment of the Court of Chancery as a distinct tribunal, governed by its own rules and principles, must be referred to the reign of Edward III.(*c*).

(*a*) 3 Blackstone, 52.

(*b*) Formerly the beginning of every suit in the superior courts of common law was a writ issued out of Chancery to the sheriff of the proper county, requiring him to command the defendant to satisfy the claim or to appear in one of those courts of law. (Stephen (H. J.), 'Treatise on Pleading,' ch. 5; see now 2 Will. IV. c. 39.)

(*c*) 1 Spence, 'Equitable Jurisdiction,' p. 338. Some have said that there was a settled court of equity at the time of the statute 28 Edw. I. stat. 3 (Articuli super Chartas, A.D. 1300), which provides (c. 5) that "the King will that the Chancellor and justices of his Bench shall follow him, so that he may have at all times near unto him some sages of the law, which may be able duly to order all such matters as shall come unto the court at all times when need shall require." But this, so far as it relates to the Chancellor, may refer to his ministerial duties. A separate jurisdiction of the Chancellor was established by 36 Edw. III. st. 1, c. 9; but it is limited to redress of grievances, con-

v. *Ecclesiastical Courts.*—Another important change in the judicature, at the epoch to which we are now referring, was the regulation of the jurisdiction of the Ecclesiastical Courts. We have already referred to the recognition of that jurisdiction by the Conqueror, and to the limitations imposed with respect to it by the Constitution of Clarendon. The extent of the separate ecclesiastical jurisdiction was, both before and long after those constitutions were enacted, the subject of vehement dispute between the clergy on the one hand, and Parliament and the courts of law on the other. Repeated instances(*a*) of collision between the judges and the bishops as to the jurisdiction of the latter occurred, and the courts of law frequently issued "Prohibitions" against proceeding in the Ecclesiastical Courts with suits not lawfully cognizable there. In the beginning of the reign of Edward I., an Act of Parliament was made, entitled *Prohibitio formata de statuto Articuli*

trary to the preceding articles of that statute, which relate chiefly to the duties of the King's purveyors. Coke, who was strongly opposed to the jurisdiction of the Court of Chancery, attempts to fix its origin as late as the time of Richard II.; but that the Chancellor had previously exercised a separate jurisdiction is clear from the petition of the Commons in 45 Edw. III., "that no plea be thereafter pleaded in Chancery unless the King be properly concerned, or the matters relate to that jurisdiction; and that all pleas there already depending be sent to the common law; and that no person who shall sue there, or to the Council, by bill, be for the future delayed of suitable redress, as they have been to their grievance." (1 Kennedy, 'Code of Chancery Practice,' 5.) It will be observed that this petition recognizes certain matters as properly belonging to the Chancellor's jurisdiction,—possibly such matters as are mentioned in the statute 27 Edw. III. c. 26, concerning merchants, and 36 Edw. III. st. 1, just cited. The above-mentioned petitions, and similar petitions of the Commons in 4 Hen. IV., are cited in the certificate of Bacon and the rest of the King's Council to James I. in 1616. This part of the proceedings relative to the contest between Coke and Lord Ellesmere, as to the power of the Court of Chancery, is fully given at the end of 'Reports of Cases taken and adjudged in the Court of Chancery in the Reign of King Charles I.,' etc. vol. i., together with a great deal of curious matter respecting the origin of the Court of Chancery.

(*a*) Coke, 2 Inst., p. 600. Tit. Articuli Cleri.

The statute Circumspecte Agatis is supposed by some to have issued 13 Edw. I., and by others more probably 9 Edw. II. (3 Blackstone, 53, note.)

Cleri, enumerating causes which belonged to the Secular Courts, and restricting the Courts Christian to causes relating to wills, matrimony, and pure spirituality. In the same reign, or the following, the clergy procured the statute *Circumspecte Agatis* to be made, further defining the jurisdiction of the Ecclesiastical Courts, but without contravening the previous statute, and commanding the judges not to interfere with the Courts Christian in causes relating to penance for deadly sin, the protection of churchyards, and other ecclesiastical causes mentioned in the statute. The ecclesiastical jurisdiction was further defined by the *Articuli Cleri*, 9 Edw. II. st. 1, A.D. 1315. This legislation however by no means put an end to the contests between the Ecclesiastical and Secular Courts. In 1 Edw. III., A.D. 1327, the Commons complain that persons who have been indicted and tried at law, afterwards proceed in the Ecclesiastical Courts against the indictors for defamation; and thereupon it is enacted that a prohibition may be granted against such suits in the Ecclesiastical Courts(*a*). By 25 Edw. I. st. 3, c. 4, A.D. 1350, clerks secular or religious, convicted before the secular justices of felonies and treasons, touching any but the King, are to be delivered to their ordinaries for punishment. Lastly, by 50 Edw. III. c. 4, extending the operation of a previous statute, 24 Edw. I., the jurisdiction of the Ecclesiastical Courts was further established by a provision, that where writs of prohibition had been unduly obtained against suits in the Ecclesiastical Courts, the Chancellor or Chief Justices might, if of opinion that the causes were cognizable in those courts, authorize them to proceed with the suits, and no further prohibition against them should be allowed.

vi. *Local Courts.*—The last branch of our inquiry respecting the establishment of the judicature in the reigns of the first three Edwards is of great importance, and relates to the authority of local jurisdictions. We have seen how impor-

(*a*) I Edw. III. c. 11.

tant these were in the Ante-Norman times. We have seen also that after the Conquest the King's superior courts obtained a general jurisdiction over civil causes; but the local jurisdictions were not taken away. These jurisdictions, up to the time of Edward I., were principally the County Court, Sheriff's Tourn and Court Leet, or view of frank pledge(*a*), the sittings of which were regulated by the Magna Charta of Henry III. The County Court was the ancient schyremote stripped (as we have seen) of much of its power and dignity after the Conquest. In this court the freeholders were the real judges, and the sheriff the ministerial officer. The sheriff's tourn was the rotation of the sheriff for holding his court in different parts of his county. The Court Leet was a court held within a particular hundred, lordship, or manor, by charter granted to the lord of the hundred or manor(*b*). These courts had jurisdiction both civil and criminal in cases of minor importance. It was provided in the time of Edward I., that the sheriffs should entertain pleas of trespass in their counties as they had been accustomed to be pleaded, and that such pleas should not be in the King's Courts, unless the goods taken away were worth forty shillings at least(*c*). Pleas of trespass and debt were held in the County Court, the Hundred Court, the Court Baron, and such like, if the debt or damages amounted to less than forty shillings. The proceedings therein might be tried by jury, and from their judgment there was an appeal by writ of false judgment(*d*). These appeals were to be made to the King's Courts(*e*).

With respect to the inferior jurisdictions, the most important innovation at the epoch in question was the ap-

(*a*) In the more ordinary sense, "frank pledge" and "leet" were synonymous; but in Magna Charta "free pledge" is used in a restricted sense, and applies to that part only of the business of a court leet which relates to the taking of sureties, or free pledges, for every person within the jurisdiction. (Butler's Co. Litt., 115 *a*, note 10.)

(*b*) 3 Blackstone, 36; 4 Blackstone, 273.

(*c*) 6 Edw. I. c. 8.

(*d*) Co. Litt., 117 *b*.

(*e*) 52 Hen. III. c. 19; 1 Edw. III. st. 1, c. 4.

pointment of county *justices of the peace*, assigned by the King to keep the peace in their several counties. It is said that they were first appointed by the Crown in the first year of Edward III. (*a*). However this may have been, it seems certain that until the time of Edward III., these functionaries had power only as conservators of the peace, and had no authority to punish offences. This power seems to have been first given to them by 2 Edw. III. c. 6, which recites that by the Statute of Winchester, the justices assigned were required to inquire of defaults, and report to the King in Parliament; but, this provision having proved ineffectual, it is enacted that the justices "shall have power to punish the disobeyers and resisters." Their authority was greatly enlarged by 34 Edw. III. c. 1. This statute provides that in every county there shall be assigned, for the keeping of the peace, one lord, and three or four others, with power, among other things, to hear and determine at the King's suit all manner of felonies and trespasses done in the same county, and that writs of Oyer and Terminer should be granted. These justices, however, seldom, if ever, tried any greater offences than small felonies, their commission providing that in cases of difficulty they should not proceed to judgment except in the presence of one of the

(*a*) By 1 Edw. III. st. 2, c. 16, "For the better keeping and maintenance of the peace, the King will That in every county good men and lawful, which be no maintainers of evil or barretors in the country, shall be assigned to keep the peace." Blackstone says that on this occasion the election of the conservators of the peace was taken from the people and given to the King; this assignment being construed to be by the King's commission. (1 Comm. 351; see also Burns, Justice of the Peace, tit. Justices of the Peace, § 2.)

At the Conquest, the Lords of Townships had a right called the Right of Infang Thief, or summary punishment of criminals taken in open delict. But as the Government became settled, the supreme courts discouraged territorial franchises; and the paramount authority of the King's Justices and Conservators of the Peace caused them to fall into desuetude. No instance is known of the exercise of Infang Thief after the reign of Edward III., except in Halifax, where a judicature founded on Anglo-Saxon custom subsisted until a comparatively recent period. (1 Palgrave, English Commonwealth, ch. 7.)

King's judges(*a*). It was provided about the same time that the justices should hold *Quarter Sessions* in every county in England regularly four times a year, and also sessions at all times needful(*b*).

From the foregoing review of the changes in the judicature in the time of the first three Edwards, it appears that all the principal parts of our present judicial system were then established. The several jurisdictions of the three superior Courts of Law, of the Courts of Assize, the Court of Appeal in the House of Lords, the Court of Chancery, the Ecclesiastical Courts, the Local Courts, including those of the justices in Quarter Sessions, as then settled, have continued, with comparatively little alteration, to the present day. Other jurisdictions have been created at later times, less favourable to the administration of justice according to the established principles of our English laws; but these later innovations have for the most part failed to stand the test of time; and the judicial system introduced by Edward I., and improved by his immediate successors, have remained to this day without any permanent fundamental change(*c*).

It is therefore unnecessary here to pursue any further particular inquiry into the history of English judicature, for enough has been stated to show the origin of its principal parts, and any further reference to the history of the Courts of Justice may be postponed until we come to treat of them severally. It will be convenient, however, to notice, as a matter affecting the courts generally, some illustrations of the constitutional principle, that though the Crown has a prerogative to erect new courts, the procedure of those

(*a*) 4 Blackstone, 271.

(*b*) 25 Edw. III. st. 1, c. 6.

(*c*) Blackstone has ably summarized, in the concluding chapter of his 'Commentaries,' many of the admirable changes in the judicature effected by Edward I., especially in the common law; but great as were the changes thus mentioned, they were but part of that thorough remodelling of the judicature which took place during the epoch described in the text.

courts must, unless Parliament otherwise direct, be according to the *Common Law*.

The ancient collection of unwritten maxims and customs which originally constituted the Common Law, subsisted immemorially from a period anterior to the Norman Conquest. About that time great efforts were made by the clergy to introduce into this country many of the principles of the *civil law* of ancient Rome, and to blend them with feudal customs(*a*). How far the Ante-Norman law was borrowed from this civil law is a matter of controversy. The ancient common-law writers and judges disclaimed all connection between the two kinds of law, and professed a hearty aversion for the civil law(*b*). Yet that the common law was under some obligations to it, appears by the comparison of the two systems(*c*), and is antecedently probable when the necessary influence of the long occupation of this country by the Romans is considered. But however this may be, it is certain that after the Conquest the clergy were strenuous in promulgating the civil law, and the laity were equally strenuous in opposing it. In this country, where a mild and rational system of law had long been established, the people who had already severely felt the effect of the Norman innovations continued wedded to the use of the common law.

Parliament, as well as the common people, resisted the introduction of the civil law. An instance of this, often referred to, is that recorded in the statute of Merton, 20 Hen. III. c. 9, A.D. 1235. The prelates wished a law to be made, in conformity with the canon law, that bastard children born of parents subsequently married should be legitimated by the marriage. The earls and barons refused

(*a*) 1 Blackstone, 18. (*b*) *Ibid.* 22.

(*c*) "A suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta; a clear proof of the indirect benefit which our common law derived from the civil code." (1 Blackstone, 22; 1 Spence, Equitable Jurisdiction, 286.)

to assent to such a law;—*Unâ voce responderun tquod nolunt leges Anglie mutare que usitate sunt et approbate.*

The earlier statutes contain abundant evidence of the persistence of Parliament in demanding that causes civil and criminal should be tried according to the course of common law. Thus, by a clause of Magna Charta (9 Hen. III. st. 1, c. 29), already cited, no freeman was to be deprived of his liberty or property except by lawful judgment of his peers or by the law of the land (*nisi per legale judicium parium suorum vel per legem terræ*) (*a*). By 25 Edw. III. st. 5, c. 4, which recites the last-mentioned statute, it is enacted "that from henceforth none shall be taken by petition or suggestion made to our lord the King or to his Council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by suit original at the common law; nor that none be out of his franchises or freeholds, unless he be duly brought in to answer, and forejudged of the same by course of the law." And by 28 Edw. III. c. 3, no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.

But though these statutes clearly prohibited the erection of courts the principles and practice of which were not regulated by the common law, several such tribunals were subsequently erected; and the simplicity of the common law was so far departed from, that various kinds of law were administered by different courts, some of local, and some of more general jurisdiction. The jurisdiction of the Ecclesiastical Courts, which proceeded according to the civil law and canon law (*b*), was, as we have seen, regulated by

(*a*) The words are thus translated by Reeves:—"the judgment of his peers, or by some other legal process or proceeding adapted by law to the nature of the case." (1 Reeves's Hist. of the English Law, p. 249.) The distinction between *judicium parium* and trial by jury is adverted to *infra*, Bk. II. Ch. III.

(*b*) By the civil law, absolutely taken, is understood the civil or municipal

Acts of Parliament. The Maritime Courts, which are also governed partly by the civil law, were probably considered to be exempt from the operation of the statutes above cited, which require causes to be tried according to common law; because the Maritime Courts, the Court of Admiralty and its Courts of Appeal, determined injuries arising upon the seas, or in parts out of the reach of the common law(*a*), and within the jurisdiction of the Admiralty; also, the power of this court was at an early date recognized by Parliament. By statute 13 Ric. II. st. 1, c. 5, after reciting accroachments of that court to the prejudice of the common law, it is provided, that admirals and their deputies shall not meddle from thenceforth "of anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble Prince, King Edward, grandfather of our Lord the King that now is."

The most important instance however of a judicature, founded subsequently to Magna Charta, and not governed exclusively by the rules of the common law, was the Court of Chancery. The equitable jurisdiction of the chancellor was regulated in a great measure by the civil law, and subsequently met with much opposition from the Commons. We have seen that they petitioned Edward III. that ordinary civil suits should be prosecuted at common law, and not in Chancery or the Council. In the reign of Richard II. the struggle between

law of the Roman empire as comprised in the institutes, codes, and digest of the Emperor Justinian, and the novel constitutions of him and some of his successors. The canon law is a body of Roman ecclesiastical law, consisting chiefly of decrees of general councils, and of certain Popes of the twelfth, thirteenth, and fourteenth centuries; and besides these pontifical collections, part of the canon law is of English origin, viz. constitutions of national and provincial synods of our Church held before the Reformation. The authority of the canon law in England depends on the statute 25 Hen. VIII. c. 19, by which, until the review of the canon law directed by that Act was made (which has never been the case), the existing canons, etc., not repugnant to the law of the land, were still to be used and executed. (1 Blackstone, 83.)

(*a*) Co. Litt., 260 *a*, where it is said that this jurisdiction existed long before the reign of Edward III. See, as to the antiquity of this court, 15 State Trials, 1231, and the references there given.

the Commons and the Court of Chancery was continued. The Commons petition in the thirteenth year of that reign, A.D. 1389, that the Chancellor or the King's Council might not interfere in matters remediable at law. To which the King answered, that "he would keep his regality as his predecessors had done before him," and many similar petitions met with a similar fate(*a*). At length a statute was passed, which, while it in some measure regulated the jurisdiction of the Court of Chancery, recognized its authority. By 17 Ric. II. c. 6 (A.D. 1393), "forasmuch as people be compelled to come before the King's Council, or in the Chancery, by writs grounded upon untrue suggestions, that the Chancellor for the time being presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion to him which is so troubled unduly." A later statute, 31 Hen. VI. c. 2 (A.D. 1452), also recognized the judicial authority of the Chancellor, and enlarged it in several particulars(*b*). Thus it appears that the jurisdiction of the Court of Chancery was originally founded on the King's prerogative, but was ultimately established by the implied recognition of the Legislature.

Another jurisdiction not regulated by common law was that of the Star Chamber; but this jurisdiction, though originally constituted by the Royal prerogative, was, as we have seen, extended by statute in the reign of Henry VII. Another instance of invasion of the jurisdiction of common law in the same reign was a statute, 11 Hen. VII. c. 3(*c*), enabling justices of assize and justices of the peace

(*a*) Many of these petitions are fully noticed in Sir Francis Palgrave's Essay upon the Original Authority of the King's Council, p. 45. (1 Spence, Equitable Jurisdiction, 353.)

(*b*) 1 Spence, Equitable Jurisdiction, 353.

(*c*) "By colour of which Act, shaking this fundamental law, it is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson, Knight, and Sir Edmund Dudley, being justices of the peace throughout England." (Coke, 3 Inst.)

to determine all offences (except treason, murder, and felony), upon *information*, for the King without the regular process of indictment; but this statute was repealed in the first year of the following reign(*a*). The Court of Requests, established in the reign of Henry VIII., is another instance of a court not governed by common law. This tribunal had its origin from the Privy Council, and was instituted as a Court of Equity for poor suitors; the jurisdiction was plainly illegal till confirmed by statute 3 Jac. I. c. 15(*b*).

The history of the jurisdictions of the Courts of the Universities of Cambridge and Oxford affords an apt illustration of the important constitutional principle now under consideration—viz. that though the King might erect new courts, yet he could not alter the course of the law by his letters patent. It was on this ground that the ancient charters creating the University jurisdictions were held to be invalid; and accordingly, in the reign of Queen Elizabeth, an Act of Parliament (13 Eliz. c. 29) was obtained confirming all those charters. Which *blessed act*, as Sir E. Coke entitles it, established this high privilege without any doubt or opposition; or, as Sir Matthew Hale very fully expresses the sense of the common law and the operation of the Act of Parliament, "Although King Henry VIII., 14 A.R. sui, granted to the University a liberal charter to proceed according to the use of the University, viz. by a

(*a*) 1 Hen. VIII. c. 6.

(*b*) 3 Blackstone, 81.—

This court was at first no other than the Privy Council, but in the course of the reign of Henry VIII. it was composed of the Lord Privy Seal and the Masters of the Requests, who were generally Doctors of the Civil Law, like the Masters in Chancery. It sat regularly until 41 Eliz., when, less fortunate than its cognate jurisdictions, a decision of the Court of King's Bench destroyed its credit and authority; it being adjudged that the court called "the Court of Requests or the Whitehall" was no court that had power of judicature. (Palgrave, Original Authority of the King's Council, p. 99.) Bacon, in his 'History of Henry VII.,' says, there was always reserved a high and permanent power to the King's Council in causes that might in example or consequence concern the state of the Commonwealth; which if they were criminal, the Council used to sit in the chamber called the Star Chamber; if civil, in the White Chamber, or Whitehall.

course much conformed to the civil law, yet that charter had not been sufficient to have warranted such proceedings without the help of an Act of Parliament. And therefore, in 13 Eliz. an Act was passed whereby that charter was, in effect, enacted; and it is thereby that at this day(*a*) they have a kind of civil law procedure even in matters that are of themselves of common law cognizance, where either of the parties is privileged"(*b*).

The last instance, and it is a very important one, which we shall here cite of tribunals not regulated by the common law, is that of Courts Martial. Of the ancient history(*c*) of these courts, it is not necessary to give here more than a very few particulars. The constitution of this country permits, for the government of the army, a military law different from the common law. But like all other jurisdictions not regulated by common law, the powers of military tribunals were regarded with jealousy by our ancestors, and were limited by ancient statutes. For martial law is allowed only on account of the necessity of discipline in the army, and is, therefore, not allowed in cases cognizable in the ordinary courts of justice. Wherefore Thomas, Earl of Lancaster, being condemned at Pontefract (15 Edw. II.) by martial law, his attainder was reversed (1 Edw. III., A.D. 1327), because it was done in time of peace(*d*). The military courts of that time were held before the Constable and Marshal. In 13 Ric. II., A.D. 1389, the Commons complained that the court of the Constable and Marshal had encroached on the civil jurisdiction of the common

(*a*) By 17 & 18 Vict. c. 81, s. 45, "The court of the Vice-Chancellor of Oxford shall, in all matters of law, be governed by the common and statute law of the realm, and not by the rules of the civil law."

(*b*) 3 Blackstone, 84.

(*c*) Concerning the Constable and Marshal, and Courts Martial, see Madox, Hist. of the Exchequer, vol. i. pp. 39, 42; 1 Blackstone, Comm., 408; 3 Blackstone, 68; 4 Blackstone, 268.

(*d*) 1 Blackstone [414]. A statute of the same year, 1 Edw. III. st. 2, c. 15, recites that many in this realm were, in the time of the King's father, unlawfully compelled to bind themselves in writing to assist the King with arms, and prohibits such writing for the future.

law; and it was therefore declared by statute (*a*) that the jurisdiction of the Constable pertained only to "cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by common law." This related to the civil jurisdiction of the Constable. But his court had also a criminal jurisdiction and cognizance of all appeals of offences done out of the realm, and proceeded according to the civil law. By 1 Hen. IV., c. 14, all appeals to be made of things done within the realm were to be tried according to the laws of the realm, and all appeals to be made of things done out of the realm were to be tried and determined before the Constable and Marshal for the time being. Appeal in this statute signifies a criminal accusation (*b*).

The office of High Constable became extinct in the reign of Henry VIII., and the criminal as well as civil jurisdiction of the Court of Chivalry has long fallen into entire disuse. In the third year of Charles I., Parliament complained of commissions issued by that King, by which commissioners were appointed to proceed within the land according to martial law against soldiers and mariners committing crimes, and to try them in the manner used in time of war. The Petition of Right, 3 Car. I., recites the provisions of Magna Charta and other statutes contravened by these commissions, and requires that they be revoked, and no such commissions be issued for the future.

(*a*) 13 Ric. II. c. 2.; See also 8 Ric. II. c. 5.

(*b*) Co. Litt. 74 *b*.

Blackstone says the Court of Chivalry, when held as a criminal court before the Lord High Constable jointly with the Earl Marshal, had jurisdiction over pleas of life and member arising in matters of arms and deeds of war, as well out of the realm as *within it*. (4 Blackstone, 268.) For a history of the controversy respecting the jurisdiction of the Earl Marshal, with or without the Constable, see Butler's Co. Litt., 74 *b*, note 1.

Coke says (*ibid.*), if a man be mortally wounded in France, and die thereof in England, it is said an appeal lieth upon the statute 1 Hen. IV. c. 14, here cited, for it is not punishable by common law. But such an offence is now punishable in England. (9 Geo. IV. c. 31, s. 8.)

Courts Martial are now sanctioned by the Annual Mutiny Acts. The first of these Acts was passed in the commencement of the reign of William III. (1 W. & M. sess. 1, c. 5, A.D. 1688), and is entitled "An Act for punishing officers and soldiers who shall mutiny or desert their Majesties' service, to continue to November 1689, and no longer." The system of annually passing a Mutiny Act has been continued from that time to the present. These Acts recite that "no man can be forejudged of life or limb, or subjected, in time of peace, to any kind of punishment within this realm by martial law, or in any other manner than by judgment of his peers, and according to the known and established laws of the realm." The Mutiny Act proceeds to authorize the Crown to make articles of war for the government of the army, defines the persons to be subject to them, and enables the Crown to grant authority for convening Courts Martial for the trial of offences by persons in the army. A similar power over the marines is given to the Lords of the Admiralty by another annual Act "for the regulation of her Majesty's marine forces while on shore."

CHAPTER III.

JUDICIAL OFFICES.

In this chapter it is intended to inquire into the constituent parts of Courts of Justice, and the nature of judicial offices generally.

In every court there must be at least three constituent parts—the *actor*, *reus*, and *judex*: the actor, or plaintiff, or prosecutor, who complains of an injury; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appear to have been done, to ascertain the remedy (*a*). In English law, these functions of the judex are not always performed wholly by judges; but are, in many cases, divided between them and juries in a manner which will be considered; also, the parties to a cause are usually not required to prosecute and defend their causes in person, but may be represented by advocates and attorneys. Lastly, in all courts of justice, and subject to their authority, are various subordinate officers appointed to assist the judges, and give effect to their judgments. We shall, therefore, have to consider the functions of (1) Judges, (2) Juries, (3) Counsel and Attorneys, (4) subordinate officers of Courts of Justice. And with respect to all these, we shall endeavour

(*a*) Hallifax, 'Analysis of the Civil Law,' edited by Dr. Geldart (8vo, 1836), 140. This work contains a very concise, and also very clear outline of the Roman law, and useful references to more extensive works.

to limit the inquiry as far as possible to questions of constitutional importance.

1. JUDGES.—A judge, in the most general signification of the word, is a person appointed by authority to hear and determine causes, civil and criminal, in courts of justice. But our law, in many cases, appoints different methods of determining issues of law and issues of fact, the former being tried by judges properly so called, and the latter by other methods, of which the principal(*a*) is the trial by jury. In a somewhat similar way during the Roman Republic, the offices of magistrate and judge (*judex*) were separate. The office of the former was to inquire into matters of law, and of the latter into matters of fact. When the magistrate took cognizance both of the law and the fact, he was said to administer justice *extra ordinem*(*b*). Similarly, in many English tribunals, the same judge determines matters of law and of fact, as we shall see when we come to treat of the courts severally.

The authority most frequently cited as to the distinction of the offices of Judge and Jury, is Sir Edward Coke, in the following passage, in which, after speaking of the qualifications of jurymen, he says, "The most usual trial of matters of fact is by twelve such men; for *ad quæstionem facti non respondent judices;* and matters in law the judges

(*a*) In the superior courts of common law, issues of fact may, in some cases, now be tried by the judge, without the intervention of a jury. (See *infra*, Ch. IX.) In the modern County Courts, issues of fact are most frequently tried by the judge, but sometimes by juries. (See *infra*, Ch. XI.)

There are some other modes of trying facts, which are, however, of rare and limited application. The principal of them is trial by record, where a question arises as to what has judicially taken place in a superior court of record, and the trial is had by inspection and examination of the record. (Stephens, Of Pleading, ch. 1.) Other methods of trial of facts, allowed formerly, but now abolished, were the barbarous method of wager of battle and trial by ordeal, as to which, see 4 Blackstone, c. 27.

(*b*) Geldart's Hallifax, Civ. Law, 136. In civil causes usually only one *judex* was appointed to examine the facts in question. In criminal causes a number of selected *judices* sat together, and gave their verdict as English jurors do. (*Ibid.* 177, 182.)

ought to decide and discuss, for *ad quæstionem juris non respondent juratores*" (*a*). This *decantatum*, as Lord Chief Justice Vaughan calls it (*b*) on account of its frequency in the books, about the respective provinces of judge and jury, became the subject of very heated controversy, especially on prosecutions for state libels, which have been considered in a previous chapter (*c*). The reports of those trials, and the proceedings in Parliament in the debates on Fox's Libel Act in 1792 (*d*), contain full particulars of that controversy. The following conclusions, taken with some abridgment from a very eminent constitutional authority, appear to contain the principal distinctions which limit the province of juries in trials at law.

On the one hand, as the jury may, as often as they think fit, find a "general verdict," it is unquestionable that they so far may decide upon questions of law as well as of fact, such a verdict necessarily involving both (*e*). On the other hand, it seems clear that questions of law generally, and more properly, belong to the judges, and that on account of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice. If the parties litigating agree in their facts, the cause can never go to a jury, it being a rule without exception that issues in law are ever determined by the judges, and only issues of fact by jury. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge who presides at the trial to inform them what the

(*a*) Co. Litt. 155 *b*.

(*b*) "That *decantatum* in our books, '*Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores*,' literally taken, is true. . . . But upon all general issues, as *not culpable*, pleaded in trespass, . . . the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the Court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself." (Lord C. J. Vaughan's judgment in Bushell's case, 6 State Trials, 1013.)

(*c*) *Ante*, Book I. Ch. XI. (*d*) *Ibid.*

(*e*) See as to the rules of pleading, which allow in some cases mixed issues of law and of fact, *infra*, Book II. Ch. IV.

law is, and as a check upon the judge in the discharge of this duty, either party may except in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found an appeal upon it(*a*). The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large and leave the conclusion of law to the judges of the court from which the issue comes. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges, but they have a right to control the verdict, and declare the law as they conceive it to be. The courts have long exercised the power of granting new trials in civil cases where the jury find a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one.

The result is that the *immediate* and *direct* right of deciding upon questions of law is entrusted to the judge; that in a jury it is only *incidental;* that in the exercise of this incidental right the latter are not only placed under the control of the former but are in some degree controllable by them; and therefore that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges. In favour of this conclusion the conduct of juries bears ample testimony; for to their honour it should be remembered that the examples of their resisting a judge in points of law are rare, except where they have been provoked into such

(*a*) A bill of exceptions is given by the statute of Westminster, passed in the reign of Edward I., and is an admirable check to the rashness or mendacity of judges, for it empowers the parties to put down in writing the exact terms in which the judge who tries the cause has laid down the law, and subjects him to an action if he do not acknowledge it by his seal. It then goes by writ of error before a superior tribunal, where his ruling is reconsidered, and may be either affirmed or reversed. But on a motion for a new trial, the judge at his discretion states verbally how he laid down the law, no averment being allowed against his statement. (2 Campbell's 'Lives of the Chief Justices,' 396; the Statute of Westminster the second, c. 31.)

It seems to be the general opinion that bills of exceptions will lie in cases of misdemeanour, but it is doubtful whether they will lie in other criminal cases. (Archbold, 'Pleading in Criminal Cases,' 145.)

opposition by the grossness of his own misconduct, or betrayed into an unjust suspicion of his intregity by the misrepresentation and ill practice of others. In civil cases, particularly where the title to real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing; and though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it, every person accused is enabled by the general plea of *not guilty* to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this benefit may always be enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace, which exception, from the necessity of the times, is continually increasing, but which however cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of a judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled either by the proud encroachment of ill-designing judges or the wild presumption of licentious juries(*a*).

On this important question of the distinction between the functions of the judge and jury, the following observations of Chief Justice Vaughan in Bushell's case, A.D. 1670, may be usefully added:—"No jury can be charged with the trial of matter in law barely; no evidence ever was or can be given to a jury of what is law or not; nor no such oath can be given to or taken by a jury to try matter in law; nor no attaint can lie for such a false oath. . . . True it is, if it fall out upon some special trial, that the jury being ready to give their verdict, and, before it is given, the judge shall ask whether they find such a particular thing propounded by him? or whether they find

(*a*) Butler's Co. Litt., 155 *b*, note 5.

the matter of fact to be as such a witness or witnesses have deposed? and the jury answer they find the matter of fact to be so; if then the judge shall declare, the matter of fact being by you found so to be, the law is for the plaintiff, and you are to find accordingly for him: if, notwithstanding, they find for the defendant, this may be thought a finding in matter of law against the direction of the court; for in that case the jury first declare the fact, as it is found by themselves, to which fact the judge declares how the law is consequent. . . . Therefore, always in discreet and lawful assistance of the jury, the judge's direction is hypothetical and upon supposition, and not positive and upon coercion: viz. if you find the fact thus (leaving it to them what to find), then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant"(*a*).

A large part of the law of England consists of rules observed in and inferred from judicial decisions. With respect to all judicial or *judge-made* law, it is to be observed that it is always subordinate to that declared by the supreme legislature. Judicial law which is declared by the decision of cases may be therefore regarded as supplementary to the statute law. It has often been asserted(*b*), but does not seem to be proved, that all laws should be made by direct enactment. But partly from the intricacy of social interests, and partly from the imperfection of language, it is not safe, nor even possible, to include all rights and obligations in general definitions, to which Acts of Parliament are necessarily restricted. However carefully such definitions be drawn

(*a*) Vaughan's Reports, p. 143, fol. ed. 1706.

"I am sure," says Sir Eardley Wilmot, in his judgment in the case of R. *v.* Almon, "it wants no great intuition to see that trials by juries will be buried in the same grave with the authority of the courts who are to preside over them." (8 State Trials, 60.)

(*b*) Bentham, in a note to his "Equity Dispatch Court Proposal," Collected Works, vol. iii. p. 370, proposes that all law should be reduced to a code, and that it should be the duty of every judge, whenever he saw in the text of the code a passage needing amendment, to propose an amendment in the very words in which it would stand if adopted by the legislature.

up, experience shows that they cannot provide for all the complex questions, especially those affecting laws of property, which come before courts of justice, and that a large part of the law must necessarily be left to be inferred from judicial decisions(*a*).

If the law depended on the discretion of the judge, it would be the law of tyrants, for it would be mutable and uncertain: *misera est servitus ubi jus est vagum aut incognitum.* But the law does not depend on the absolute discretion of the judges. The practice of courts of justice has interposed various precautions for securing the authority of judge-made law, and the consistency and accuracy of judicial decisions. These precautions are principally these:— i. The authority of precedents. ii. The course of appeals from inferior tribunals. iii. The invalidity of extrajudicial opinions of judges. iv. The practice requiring judges to state publicly the reasons of their decisions.

i. *The authority of precedents.*—It is, says Blackstone, an established rule to abide by former precedents when the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine not according to his own private judgment, but according to the known laws

(*a*) As to the legislative power of English and French courts of law, see Butler's 'Reminiscences,' iii. 3, where he adverts to the article of the 'Code Civil de Napoléon,' respecting the power of judges to interpret laws, and states that, owing to the difficulty of distinguishing between two sorts of interpretation,—the one of legislation, the other of doctrine,—the word "interpretation" was omitted from the article; it stands therefore as follows:— "It is forbidden to the judge to pronounce by way of general and regulating disposition on the causes which come before them." He proceeds to advert to several instances in which our judges have, by latitude of interpretation, assumed a power almost legislative.

and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one(*a*). In a few instances precedents are overruled by subsequent decisions, where it is manifest that the precedent decisions were founded on a mistake of law; but the cases in which any *settled* doctrine of the courts—that is, a doctrine settled by a succession of concordant decisions—has been allowed to be overruled by subsequent decisions are extremely rare; and it may well be doubted whether doctrines so established ought in any case to be allowed to be overruled by any authority less than that of Parliament. It should be added, that the propositions of Blackstone respecting the weight of decisions, though applied by him chiefly to the courts of common law, are alike applicable to all other courts of justice; which are similarly bound by their own precedents. Thus the Courts of Equity, the Admiralty and Ecclesiastical Courts, are bound; and the systems of jurisprudence of those courts are elaborate connected systems of judicial decisions. In the earlier history of the Court of Chancery, and before its principles were settled, its decrees were decried even by learned men as purely arbitrary. Thus Selden says, "For *law* we have a measure, and know what to trust to; *equity* is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot. What an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the Chancellor's conscience"(*b*). This reproach, if it were well founded when the Court of Chancery first began to actively interfere with the execution of judgments at common law, on account of the manifest injustice wrought occasionally by too rigorous adherence to technical rules, has long ceased. The Court of Chancery has had for the last two centuries a continuous series of reports of its decisions, which are re-

(*a*) 1 Blackstone, 70.

(*b*) Selden's 'Table Talk,' Tit. Eq., ed. by Singer, 1856, p. 49.

garded there as of the same binding authority as the common law precedents are in the Courts of Westminster(*a*).

ii. The certainty, uniformity, and authority of judicial law, are in a great measure secured by *the course of appeals from inferior tribunals.* The supreme courts of appeal are the House of Lords and the Judicial Committee of the Privy Council; and before one or the other of these tribunals almost every decision of the inferior British Courts on questions of law may be ultimately reviewed. A judgment of the House of Lords on an appeal, where pronounced on the merits, is absolutely irrevocable; and so strongly is this rule maintained, that it has been said judicially(*b*) that it is better for the House to maintain its decision, even if erroneous, than to allow a new appeal. In the Privy Council, after the report of the Judicial Committee is adopted by an order in council, it is final and unalterable, and a rehearing on the merits of the judgment is not allowed(*c*). "It is," says Lord Chief Justice North, in his judgment in the great case of Barnardiston and Soame, "the principal use of writs of error and appeals to hinder the change of the law; therefore do writs of error in our law, and appeals in the civil law, carry judgments and decrees to be examined by supe-

(*a*) The earliest reported Chancery precedents are Tothill's 'Transactions,' commencing with the reign of Elizabeth, and 'Reports of Cases taken and adjudged in the Court of Chancery in the Reign of King Charles I., Charles II., and James II.' By reference to the preface of the second edition of the latter work, A.D. 1715, it is clear that decrees in Chancery were, during the period of these reports, very often reversed by succeeding Chancellors; so that at the time Selden wrote (the seventeenth century), his sarcasm above mentioned on that court was by no means purely gratuitous.

The judgments of all the superior courts are carefully registered, and to them frequent recurrence is had when any critical question arises, in the determination of which former precedents may give light or assistance. But the precedents most commonly cited are those contained in the printed reports of cases, which are collected by reporters who are not officers of the courts.

(*b*) Per Lord Eldon; Macqueen, 'Appellate Jurisdiction,' 437.

(*c*) *Ibid.* 770.

rior courts, until they come to the highest, which are entrusted that they will not change the law. . . . For otherwise it would be very easy for judges, by construction and interpretation, to change even a written law; and it would be most easy for the judges of the common laws of England, which are not written, but depend upon usage, to make a change in them. . . . I admit that the laws are fitted to the genius of the nation; but when that genius changes, the Parliament only is entrusted to judge of it, and, by changing the law, to make it suitable to it. But if the judges shall say it is common law, because it suits with the genius of the nation, they may take upon them to change the whole as well as any part of it, the consequence whereof may easily be seen"(*a*).

iii. Another important precaution for securing the authority of judge-made law is this, that only those decisions of the judges are binding which are made *judicially*, that is, in the determination of causes properly brought before them in their courts of justice. Speaking of an opinion of all the judges, delivered by command of King Charles II., Lord Chief Justice Camden, in his celebrated judgment in the case of Entick *v.* Carrington, A.D. 1765, says, "These are the opinions of all the twelve judges of England; a great and reverend authority! Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration that such is their opinion? I say, No. It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority from whence this opinion may be fairly collected, otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it"(*b*).

But though the judges cannot give binding decisions on the interpretation of laws extrajudicially, there are some cases in which the law recognizes an authority to consult the judges out of their courts on questions of law. The

(*a*) 6 State Trials, 1094. (*b*) 19 State Trials, 1071.

English judges are (as we have seen) regularly summoned by writs to Parliament as assistants, and for many centuries they have officiated in the House of Lords as advisers. Their opinions are generally given upon abstract questions propounded by the House for their consideration, but those opinions, even when unanimous, do not govern the decisions of the House(*a*). Sir Edward Coke says that for matters of law the judges are the King's counsel. But he omits explaining whether they are so called on account of their judicial opinions in the King's courts, or of their opinions in Parliament when advised with by the Lords, or of any extrajudicial opinions which the King may be entitled to demand of them. Coke himself was strongly opposed to the practice of judges giving extrajudicial opinions; and in the great case of *Commendams,* in the reign of James I., boldly refused to give such an opinion when summoned before the Privy Council for the purpose(*b*).

In the Act of Charles I. (16 Car. I. c. 14), vacating the records concerning ship-money, the extrajudicial opinion of the judges who had been consulted by the King respecting

(*a*) Macqueen, 'Appellate Jurisdiction,' Introduction.

(*b*) In the case of Peacham, indicted for treason on account of a sermon written but not preached by him, 12 James I., A.D. 1615, Bacon was commissioned by the King to obtain privately Coke's opinion whether the offence charged amounted to treason. In a note to the King, Bacon speaks thus of his interview with Coke:—"He fell upon the same allegation which he had begun at the council table, that judges were not to give opinions by fractions, but entirely, according to the vote whereupon they should settle upon conference; and that this auricular taking of opinions single and apart was new and dangerous, and other words more vehement than I repeat. I replied, in civil and plain terms, that I wished his lordship, in my love to him, to think better of it," etc. (2 State Trials, 869.)

"Hussey, Chief Justice, besought King Henry the Seventh that he would not desire to know their opinions beforehand for Humphrey Stafford, for they thought it should come before them in the King's Bench judicially, and then they would do that which of right they ought; and the King accepted of it. And therefore the judges ought not to deliver their opinions beforehand, upon a case put and proofs urged of one side, in absence of the party accused, especially in cases of high nature and which deserve so fatal and extreme punishment; for how can they be indifferent who have delivered their opinion beforehand without hearing of the party, when a small addition or subtraction may alter the case?" (Coke, 3 Inst. 29, 30.)

the lawfulness of that impost is condemned. There are many precedents, however, of the King consulting the judges(*a*), and some of them have occurred since the Revolution. Particularly in the case of the Aylesbury men, in the reign of Queen Anne, when (as we have seen)(*b*), the judges were consulted as to the right of appealing to the House of Lords; in the reign of George I., when it was made a question whether the education and marriage of the children of the Prince of Wales belonged to the King or to their father(*c*); and in the case of Admiral Byng, in the reign of George III. But however numerous and strong the precedents may be for consulting the judges on questions in which the Crown is interested, it is a right to be understood with many exceptions, and ought to be exercised with great reserve. The anticipation of judicial opinions in causes actually depending, is particularly to be guarded against, and therefore a wise and upright judge will ever be cautious how he answers questions of such a tendency. Even in the House of Lords, where the attendance of the judges when required is obligatory, they have, with respect to public bills, declined to answer questions likely to come before them in the courts below(*d*).

iv. The last safeguard of the justice and accuracy of judicial decisions to which we shall here advert, consists in the rule that *decisions and the reasons of them ought to be delivered publicly*. In all judgments of importance, the judges declare the reasons on which their conclusions are founded; and where the judges of a court are not unanimous in a particular judgment, it is usual for them to deliver their

(*a*) In Coke's time, references from the Privy Council to the judges on questions of law were common. The twelfth volume of his reports contains the resolutions of judges (as the title-page expresses) "in cases of law, the most of them very famous, being of the King's especial reference from the council table concerning the prerogative."

(*b*) *Ante*, p. 87. (*c*) 15 State Trials, 1223.

(*d*) Butler's Co. Litt. 110 *a*, note 5; Macqueen, 'Appellate Jurisdiction,' Introduction.

reasons *seriatim*. This course is adopted in the House of Lords, and the courts of law and equity; but a different rule is adopted in the Judicial Committee of the Privy Council, where, if any difference of opinion arises among the members, the sentiments of the minority are not divulged; but the reasons of the decision are invariably stated at length by one of the members of the Committee, and are usually embodied in a written judgment(*a*). Similarly the courts of civil law allow debates among the judges to be private among themselves(*b*).

Adverting to the importance of public judgments in criminal causes, Lord Mansfield has observed(*c*), "It is not only a justice due to the Crown and the party, in every criminal cause where doubts arise, to weigh well the grounds and reasons of the judgment; but it is of great consequence to explain them with accuracy and precision in open court, especially if the questions be of a general tendency, and upon topics never before fully considered and settled, that the criminal law of the land may be certain and known."

Of old time, before Edward III., the reasons for judgments at law used to be entered on the record in cases of difficulty, but ever afterwards were constantly pronounced by the court, that they might be entered in the books of cases and reports. If the practice were otherwise, it has been well observed(*d*), "no man could have known what the law of England is, for the year-books and reports are

(*a*) Macqueen, 'Appellate Jurisdiction,' 717.

(*b*) 8 State Trials, 434.

(*c*) Case of John Wilkes, 19 State Trials, 1098.

(*d*) Remarks on the trial of Fitzharris, in 33 Car. II., by Sir John Hawkes, Solicitor-General to William III. (8 State Trials, 434), referring to the atrocious trials for high treason in the latter part of the reign of Charles II., and the practice which the corrupt judges who were concerned in those trials introduced of delivering their judgments without stating their reasons.

Burnet, referring to the great *Quo Warranto* case in this reign, says, "The judges were wont formerly, in delivering their opinions, to make long arguments, in which they set forth the grounds of law on which they went, which were great instructions to the students and barristers; but that had been laid aside ever since Hale's time." (Hist. of his own Times, A.D. 1682.)

nothing but a relation of what is said by the counsel and judges in giving judgment, and contain the reasons of the judgment, which are rarely expressed in the record of the judgment; and it is as much the duty of a judge to give the reasons why he doubts, as it is of him who is satisfied in the judgment. Men sometimes will be ashamed to offer those reasons in public which they may pretend satisfy them if concealed. Besides, we have a maxim in law undeniable and of great use, that any person whatever may rectify or inform a court or judge publicly or privately, as *amicus curiæ*, a friend to the Court. But can that be done if the standers-by know not the reason upon which the Court pronounce their judgment? . . .

"If a man swears what is true, not knowing it to be true, though it be logically a truth as it is distinguished, yet it is morally a lie; and if a judge give judgment according to law, not knowing it to be so, as if he did not know the reason of it at that time, but bethought himself of a reason for it afterwards, though the judgment must be legal, yet the pronouncing of it is unjust. Judges ought to be bound up by the reasons given in public, and not satisfy their judgment by afterthought of reasons."

Having now considered the nature of the offices of judges, we proceed to state the manner of their *appointment*.

It is probable that in ancient times some of the highest judicial offices were obtainable by purchase(*a*). A statute of

(*a*) In Madox, Hist. of the Exchequer, vol. i. p. 2, second ed., it is stated that Richard Fitz-Alured, in the time of King Stephen, paid fifteen marks of silver that he might hold pleas of the Crown; and instances of the sale of the office of Chancellor, in the reigns of Stephen and John, are mentioned.

"In former times the most learned clerks were best studied in the laws, so the clergy thrust into almost all places of judicature, when 'twas said, *Nullus Clericus nisi Causidicus;* but King Edward I., after the Conquest, being (as 'tis said) weary of the great power of the Chief Justice of England, was the first that altered that course by making laymen judges, who kept the robes of the former judges, as they do to this day." (The Jurisdiction of the Court of Chancery vindicated. 1 Reports of Cases taken and adjudged in the Court of Chancery, 62.) In 45 Edw. III. the Lords and Commons

5 & 6 Edw. VI. c. 16, prohibits the buying and selling of a great number of specified offices, including those which "in anywise touch or concern the administration or execution of justice;" but it is provided that the Act should not invalidate any bargain for such an office made before the Act should come into operation (*a*).

The judges of all the superior courts of law and equity of original jurisdiction are appointed by the Crown, and are selected from among barristers of eminence and long standing. The Lord Chancellor is created by delivery of the Great Seal into his custody; and the other judges of the Court of Chancery are appointed by royal letters-patent. The judges of the courts of common law at Westminster are similarly appointed. By 27 Hen. VIII. c. 24, authority to make justices of assize, justices of the peace, and justices of gaol delivery, is limited to the King solely.

This statute was made to remedy various inconveniences arising from the multitude of local courts with exclusive jurisdictions then existing. By the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried: in a court-leet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* and in the sheriff's court or tourn, *contra pacem vicecomitis.* Other courts of local jurisdiction are those of the counties Chester, Durham, and Lancaster, called counties palatine. In these counties, from a remote period, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster respectively, had *jura regalia,* as completely as the King in his palace; and consequently the lords of those counties palatine administered justice by judges appointed by themselves, and not by the

petitioned that the Chancellors should be laymen, but until the reign of Henry VIII. the Chancellors were most frequently ecclesiastics. (1 Spence, Equitable Jurisdiction, 340, 347.)

(*a*) In France, from the age of Louis XII. till the time of the Revolution, most of the offices of justice were hereditary and saleable, subject to various restrictions as to the qualifications of persons to whom the offices were granted. (Butler's 'Reminiscences,' iii. 1.)

Crown. But the Act in question took away this right of appointment, and transferred it to the Crown. Various statutes have since been passed, abolishing or abridging the privileges of peculiar jurisdictions, and transferring to the Crown the power of appointing judges(*a*). Many courts, however, still remain of which the judges are appointed by other authorities.

Of the judges not appointed by the Crown, the following are the principal:—The judges of the ecclesiastical courts, consisting of those of the archdeacons' courts, appointed by the archdeacons; those of the consistory courts, appointed by the bishops in their several dioceses; and those of the courts of the archbishops; the judges of the courts of the Chancellors and of the High Stewards of the Universities; the judges of the sheriffs' courts, who are the deputies of the sheriffs; and the courts of some cities and boroughs (*e. g.* the City of London), which have, by ancient charter or prescription, the right of choosing their own judicial officers(*b*). Most of the courts of municipal corporations are, however, now subject to the Municipal Corporations Act of 1835 (5 & 6 Will. IV. c. 76), which authorizes the Crown to appoint recorders, justices of the peace, and salaried police magistrates in the boroughs specified in the Act. To the list of judges not appointed by the Crown may be added those of the counties palatine of Durham and Lancaster, which retain part of their ancient exclusive jurisdiction(*c*); those of the Stannaries Courts of Cornwall, who, when there is a Duke of Cornwall of full age, are appointed by him, or otherwise by the Crown(*d*).

In the times of Charles I., Charles II., and James II., common law judges were very frequently removed for poli-

(*a*) 1 Blackstone, 117; 3 Blackstone, ch. 6.

(*b*) Hallifax, Civil Law, edited by Geldart, book iii. c. 10; 3 Blackstone c. 4 and 6.

(*c*) 2 Will. IV. c. 39, s. 21.

(*d*) 6 & 7 Will. IV. c. 106, s. 1. There was anciently an appeal from the Court of the Lord Warden of the Stannaries to the Prince's Privy Council (4 Inst. c. 45), and when there was no Prince of Wales, to the King in council. But now appeals from the Vice-Warden are regulated by the statute 18 & 19 Vict. c. 32.

tical causes, and in order to make way for others more compliant with the wishes of the Court. Among the numerous instances of such removals, the following may be cited:— In 10 Car. I., Sir Robert Heath was removed from his Chief Justiceship of the Common Pleas, to make room for Sir John Finch, who was more favourable to the views of the Court respecting ship-money(*a*). Sir Robert Atkins, a justice of the Common Pleas, was displaced by Charles II., in 1679, probably on account of his connection with the party who withdrew from the Council at that time(*b*). Sir Francis Pemberton, Chief Justice of the King's Bench, was removed in 34 Car. II., A.D. 1683, that Sir Edmund Saunders might preside at the decision of the great *Quo warranto* case against the City of London, in which he had drawn all the

(*a*) 3 State Trials, 834, *n*. In the two preceding reigns we find several examples of the independence of the judges. In 29 Eliz., the Queen commanded the judges to admit one of her servants to an office in the Common Pleas; and, on their refusal, sent them a peremptory command to the same effect. The judges, in their answer, reminded the Queen that she was sworn to keep the laws, and assigned the reasons for which they refused to give way. These reasons were accepted by the Queen as sufficient. (1 Anderson's Reports, sect. 201.) In the reign of James I. are several instances (referred to in a previous page of this chapter) in which Coke showed great independence as a judge. The subservience of several of the judges in the reign of Charles I. appears by their judgments in the proceedings against Elliot and others for seditious speeches in Parliament, A.D. 1629, and by their judgments in the case of ship-money, A.D. 1637; but in the latter case some of the judges decided against the Crown.

Kennet, in his 'Complete History of England,' A.D. 1630, relates that when Huntly, a minister in Kent, having brought an action against several of the judges of the High Commission Court, Charles I., A.D. 1630, sent a message to the Lord Chief Justice of the King's Bench, requiring him to proceed no further in that cause till he had spoken with the King. The justices came to a resolution that "they conceived such a message not to stand with their oaths." The King sent another message, commanding them that "they should not put the Commissioners to answer;" but the judges stoutly answered that "they could not, without breach of their oaths, perform that command."

(*b*) In the debate in the House of Commons on the impeachment of Chief Justice Scroggs, in 1680, it was said that after the expiry of the Act for licensing the press, some of the judges who had expressed an opinion that there was no law to prevent printing, were displaced in favour of others who subsequently joined in a resolution against the liberty of the press. (8 State Trials, 182.)

pleadings for the Crown. Sir Francis was then made Chief Justice of the Common Pleas, but was removed in the same year, 1683, on account of his conduct on the trial of Lord Russell, or, as Kennet says, by his not "being able to go into all the new measures of the Court"(*a*). The following removals occurred in the reign of James II.:—Sir Thomas Jones, Chief Justice of the Common Pleas, was removed in 1686 (2 Jac. II.), for refusing to support the dispensing power of the Crown. William Montague, Chief Baron of the Exchequer; Sir Job Charlton, a justice of the Common Pleas; and Sir Edward Nevil, a Baron of the Exchequer, were removed in the same year, for the same cause. The removal of Sir Edward Herbert and Sir Francis Wythers, from the King's Bench, in 1685, forms one of the most serious charges against James II. The ground of their removal was their refusal to make an illegal order at the instance of the King. Powell and Holloway, the two other judges of the King's Bench, were removed in 1688, for their conduct on the trial of the seven bishops(*b*).

(*a*) Burnet, Hist. of his own Times, A.D. 1682; Serjeant Heywood's 'Vindication of Mr. Fox's History of the Early Part of the Reign of James the Second,' App. 1; 'Historical Account of the Tenure by which the Judges held their Offices under the House of Stuart, and the List of most of those who were removed for Political Causes.'

Roger Coke relates the circumstances of the removal of Sir Thomas Jones by James II., thus:—"The King, to make a thorough reformation, will make the judges of Westminster Hall to murder the common law, as well as the King and his brother designed to murder the Parliament by itself; and to this end the King, before he would make any judges, would make a bargain with them, that they should declare the King's power of dispensing with the penal laws and tests made against recusants, out of Parliament. However, herein the King stumbled at the threshold; for it is said he began with Sir Thomas Jones, who had merited so much in Mr. Cornish his trial, and in the West. Yet Sir Thomas Jones boggled at this, and told the King He could not do it; to which the King answered, He would have twelve judges of his opinion; and Sir Thomas replied, He might have twelve judges of his opinion, but would scarce find twelve lawyers. The truth of this I have only from fame, but I am sure the King's practice in reforming the judges, whereof all (except my Lord Chief Baron Atkins and Justice Powell) were such a pack as never before sat in Westminster Hall, gave credit to it." ('A Detection of the Court and State of England,' by Roger Coke, vol. ii. p. 355, 4th ed.)

(*b*) 8 State Trials, 174.

In November, 1680, the House of Commons commenced proceedings of impeachment against several of the judges of Charles II.(*a*), and in December, 1680, resolved that a bill should be brought in "that the judges hereafter to be made and appointed may hold their places and salaries *quamdiu bene se gesserint*, and also to prevent the arbitrary proceedings of the judges." No such bill, however, was passed into a law till the statute of 12 & 13 Will. III. c. 2. That statute, made to maintain the dignity and independence of the judges, provides that their commissions shall be made, not as formerly, during the pleasure of the Crown, but during their good behaviour, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both Houses of Parliament. This principle of securing the permanence of the judges has been extended by 1 Geo. III. c. 23, by which the judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown, which was formerly held to vacate their seats.

The Lord Chancellor holds his office during the pleasure of the Crown, and usually resigns upon the dissolution of the Cabinet, of which he is a member(*b*). The Master of the

(*a*) 12 State Trials, 264 *n* (*b*); 12 & 13 Will. III. c. 2, s. 3. "After the said limitation [of the Crown to the House of Hanover] shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them."

Burnet says a previous bill (A.D. 1692) was offered to the King at the end of the session, to secure the judges' salaries, but was rejected by the King, on the representation of some of the judges that "it was not fit they should be out of all dependence on the court."

In 16 Car. I. the Lords passed a resolution, to which the King assented, that the judges should continue in their offices during good behaviour. (Parry's 'Parliaments,' 345.) Sir John Walter, Chief Baron, held his office in this reign *quamdiu bene se gesserit*. He displeased the King by an opinion respecting the independence of Parliament, and was discharged from service by a message from the King, and never again sat in court, though he held his place till he died, anno 1631. (Whitelocke's 'Memorials of English Affairs from the Beginning of the Reign of Charles I.,' fol. ed., 1732, pp. 11, 16.)

(*b*) Anciently the Chancellor was sometimes made by patent to hold his office during his life, as Walter Grey, Bishop of Chester, in the time of

Rolls is appointed by the Crown by letters-patent, and holds his office on the same terms as the common law judges, that is, during good behaviour. The Lords Justices(*a*), and the Vice-Chancellors(*b*) of the Court of Chancery, hold their offices by similar tenure.

The office of Justice of the Peace in England subsists during pleasure only, but justices are not now removed from their offices except for misconduct. According to some old statutes, the Chancellor with the council shall appoint justices of the peace, but by the usage for some centuries, the appointment is made by the Chancellor only(*c*).

In England, in order to secure the independence of the judges of political and private influence, they are amply protected in the discharge of their duty, and have permanent tenure of their offices. The danger of the appointment of incompetent judges is limited by public opinion, and particularly by the opinion of the legal profession. But as these appointments are made by the ministers of the Crown, they are like other ministerial appointments, often made with reference, in some degree at least, to political considerations. It consequently may happen that persons are sometimes appointed, who, though not incompetent, are not

King John, and others. Some, and the most part, were elected by the King only. Some had patents of the King, and were confirmed Chancellors by consent of the three estates, as was Ralph Nevill, Bishop of Chester, in the time of Henry III. (Ellesmere, 'Observations on the Office of Chancellor,' p. 15, ed. 1651.)

(*a*) 14 & 15 Vict. c. 83, s. 1. (*b*) 15 & 16 Vict. c. 80, s. 52.

(*c*) Per Lord Chancellor Macclesfield, on his impeachment. (16 State Trials, 1270.)

By 13 Ric. II. c. 7, the appointment of justices of the peace was assigned to the Chancellor, Treasurer, and other officers. But by 18 Hen. VI. cap. 1, the Chancellor alone may appoint them, in case there be no men of sufficiency in the county. Prynne was of opinion that except in such case the appointment ought still to be according to the former statute. Since that period, however, justices of the peace have been appointed by the King's special commission, under the Great Seal, and the Chancellor displaces them at his discretion. Lord Somers, in the time of King William III., occasioned very considerable ill-will by displacing a number of justices who had shown an unwillingness to sign the celebrated association paper in favour of the King. (Maddock, Chancery Practice, book 3, ch. 12.)

the most competent who could be found. But taken as the judges are from among the most eminent members of the bar, they are almost universally men of rare ability and learning. The evil of ministerial appointments of judges, with reference to their political sentiments, is inevitable as long as the prerogative of the Crown of appointing judges is exercised by advisers, whose own tenure of office is dependent on the power of a party. Complaints of judicial decisions, influenced by political bias, are however never made in the present age; partly because the judges as soon as they are appointed are independent of political ties; partly because cases which could be in any way influenced by political predilection are now very rare. The method of appointment is probably the best which could be adopted in this country; certainly it is infinitely preferable to that of appointment by popular election(*a*), which is almost inevitably fatal to the independence of the judge. "A popular judge," says Bacon, "is a deformed thing; and plaudites are fitter for players than for magistrates. Do good to the people; love them and give them justice, but let it be as the psalm says, *nihil inde expectantes*, looking for nothing, neither praise nor profit"(*b*).

Many examples are recorded of terrible punishments inflicted on judges in ancient times, who wilfully broke their oaths of office; as Sir William Thorpe, who was hanged in

(*a*) Bentham, in his "Draught for the Organization of Judicial Establishments," ch. v., 'Collected Works,' vol. iv. p. 354, advocates the election and amotion of judges by popular suffrage.

(*b*) Speech in the Star Chamber before the summer circuits, in the year 1617. (19 State Trials, 1112, *n.*)

By the Constitution of the United States of America, the President is to nominate, and by and with the advice and consent of the Senate to appoint, judges of the Supreme Court, and some others. Kent approves of this method of appointment, and observes that "The fittest men would probably have too much reservedness of manners and severity of morals to secure an election resting on universal suffrage; nor can the mode of appointment by a large deliberative assembly be entitled to unqualified approbation; there are too many occasions and too much temptation for intrigue, party prejudice, and local interest, to permit such a body of men to act in respect to such an appointment with a sufficiently single and steady regard for the general welfare." ('Commentaries on American Law,' lecture 14.)

the time of Edward III. for taking bribes, and many others referred to in the proceedings upon the impeachment of Scroggs and other judges in the time of Charles II.(*a*). So late as 1725, Lord Chancellor Macclesfield was convicted on an impeachment before the House of Lords, upon a charge of making corrupt bargains to appoint certain persons to offices in the Court of Chancery, and he was deprived, fined £30,000, and sentenced to be imprisoned till the fine was paid.

But though judges are liable to severe punishment for wilful breach of duty, the law amply protects them in the honest, even though erroneous, exercise of their powers. No action will lie against a judge for what he does judicially, though it should be laid *falso, malitiosè, et scienter,* for they who are entrusted to be judges ought to be free from vexation, that they may determine without fear(*b*). An action will not lie against a judge for anything done by him in his judicial character, and within the limits of his jurisdiction(*c*). Such an offence cannot be punished except by impeachment, on removal by the Crown, upon address of the two Houses of Parliament.

With respect to justices of the peace, protection in the upright discharge of their office is given to them by many statutes; which, among other privileges, prohibit such justices from being sued for any oversight without notice beforehand; and stop all suits begun on tender of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely punished; and all persons who recover a verdict against a justice for any wilful or malicious injury are entitled to double costs(*d*).

(*a*) *Ante*, Bk. I. Ch. 11; see also the argument of Mr. St. John, at a conference of the Houses of Parliament respecting ship-money, 16 Car. 1640. (3 State Trials, 1262.)

(*b*) Lord North's judgment in the case of Barnardiston and Soame. (6 State Trials, 1096.) See also the judgment and arguments in Fabrigas *v.* Mostyn. (20 State Trials, 81.)

(*c*) See *infra*, Bk. II. Ch. 5.

(*d*) 1 Blackstone, 354.

In the Roman law, if a judge, through ignorance of the law, pronounced an erroneous sentence, he made the suit his own, and became liable to pay the damage which such sentence had occasioned. (Geldart's 'Civil Law,' 108.)

2. JURIES.—A jury is an assembly of persons who are authorized by law, and solemnly bind themselves by oath or an equivalent obligation, to inquire into or determine facts. In courts of law, juries determine *issues* of fact joined between the parties to criminal or civil causes; and it is to such juries that the expression *trial by jury* is usually understood to be applied. But besides these, there are other juries who are authorized not to determine issues of fact, but to inquire only. Where the object is inquiry and information only, the jury is sometimes called an Inquest or Inquisition—as in the cases of *inquests of office* before sheriffs, coroners, and others(*a*), writs of inquiry for damages(*b*), juries of matrons(*c*), and grand juries.

The trial by jury which we shall have principally to con-

(*a*) Butler's Co. Litt. 158 *b*, note 3.

An inquisition, or inquest of office, is an inquiry by the King's officer,—his sheriff, coroner, or escheator,—or special commissioners, respecting claims of the Crown arising by escheat, forfeiture, and the like. Thus a coroner's jury which inquires respecting the death of a *felo de se*, or one killed by chance-medley, is an inquest of office, for formerly the Crown was entitled to a "deodand," or forfeiture of the chattel which caused the death. Similarly, inquisitions *de lunatico inquirendo* were inquests of office, on account of the rights of the Crown to the property of lunatics. (See 3 Blackstone, 259.)

Domesday Book was compiled by commissioners appointed by William III. to inquire respecting the value of lands in England, and their liability to taxation. The necessary information was obtained from local inquests. The method of inquests was continued in subsequent reigns for the purpose of ascertaining the rights of the Crown in cases of escheat, etc., and became a restraint on the undue exercise of the royal fiscal prerogatives. (Palgrave's 'English Commonwealth,' vol. i. ch. 8.)

(*b*) A writ of inquiry for damages is required where the plaintiff obtains, without trial by jury, a judgment at law entitling him to damages. In this case, as from the course the cause has taken, it has not, before judgment, come before a jury who might have assessed the damages, the Court, after judgment, directs an inquisition by the sheriff and a jury of the proper county to assess the damages. (Stephens on Pleading, ch. 1.)

(*c*) A jury of matrons is impanelled where a woman is capitally convicted and pleads her pregnancy as a ground of staying execution. (4 Blackstone, 395.) Also to protect the interest of an heir against supposititious children, and in certain other cases. (Madox's 'Chancery Practice,' book i.; 2 State Trials, 802.) When a widow declares herself with child in order to exclude the next heir, upon the writ *de ventre inspiciendo*, a jury of women may be impanelled. (3 Blackstone, 362.)

sider, is the determination of facts in the administration of civil and criminal justice, by twelve men legally chosen to decide facts according to the evidence produced before them.

The distinction between the functions of judges and juries has already been considered in this chapter. We proceed to consider—i. the cases in which verdicts of juries are required; ii. the constitution of juries; iii. the manner in which verdicts are given; iv. the effects of their verdicts; and, v., the immunities of jurymen.

It has been a question of much controversy, whether the method of trial by jury in this country were of Anglo-Saxon or Norman origin. It seems however to be now well ascertained that the Saxon institutions contained nothing resembling trial by jury in its essential characteristics(*a*). Without however entering into the particulars of this controversy, it will be sufficient here to refer to the period when trial by jury regularly came into use as a method of procedure at common law. Prior to the time of Henry II., this mode of decision was not in ordinary use, and was not resorted to except in a few specific cases, the enumeration of all or most of which may be found in Glenville. But in the reign of that monarch, a law passed, authorizing the application of the *jurata patriæ*, or inquisition of twelve men,

(*a*) Among the inquiries and authorities respecting the history of trial by jury the following modern writers may be cited:—Sir Francis Palgrave, 'History of the English Commonwealth,' ch. 8; Reeves, 'History of the English Law;' Hallam, 'Middle Ages,' chap. 8. part 1. Blackstone thinks that trial by jury is insisted upon by the provision of Magna Charta, that no freeman shall be hurt in either his person or property, "nisi per legale judicium parium suorum vel per legem terræ." (3 Comm. 350.) Coke also, in his second Institute, speaks of trial by jury as equivalent to the Judicium Parium. But later writers have shown that the two things are very different, though the Judicium Parium may have suggested trial by jury, and by legal construction has been held to intend it. The *pares* were permanent judges of the County Court, and they delivered a *judgment*; whereas the jury is a body indiscriminately selected, and subordinate to the judge, and gives only a *verdict*, on which the subsequent judgment of the Court is founded. No instance can be found in the old records in which the jury are called *pares*, or their verdict *judicium*. (Reeves, Hist. of the English Law, vol. i. p. 249, and note; 1 Palgrave's English Commonwealth, p. 244.)

to certain questions of title to land, which appear before that time to have been decided by *wager of battel* only. The new method of inquiry, which was called a *recognition of assize,* became so popular that suitors were led to adopt it by mutual consent or advice of the court, even for the decision of questions for which the ordinance of Henry II. did not provide. Such proceeding, by consent or advice (called *jurata ex consensu,* which is the modern trial by jury), continually increased in favour from the time of Glenville, and at the date of Bracton's work had become the most ordinary method of deciding issues of fact(*a*).

In this reign of Henry II., it does not appear that juries were employed for the trial of criminals, and the first instances of such trials seem to be in the reign of John, when they were occasionally allowed as a matter of indulgence. They gradually superseded the barbarous methods of trial by battel and ordeal, and in the reign of Henry III. had become the usual method of trial in criminal causes(*b*).

It is clear that the jury anciently consisted of persons who were *witnesses* of the facts, or at least in some measure *personally cognizant* of them, and who consequently, in their verdicts, gave not—as now—the conclusion of their judgment upon facts proved before them in the cause, but their testimony as to facts which they had antecedently known. Accordingly, the jury was summoned, not as at present from the body of the county, but from the immediate neighbourhood where the facts occurred, and from among those persons who best knew the truth of the matter(*c*).

(*a*) Stephens on Pleading, xxxvii.

(*b*) Palgrave's 'Commonwealth of England,' chap. 8.

(*c*) Stephens on Pleading, 168. So essential did the Common Law deem the having some of the neighbours on the jury, that if the *visne* appeared on the record to be from a wrong place, it was a good ground for arresting or reversing the judgment. (Butler's Co. Litt. 125 *a*, and note 2 *ibid.*)

The presence of witnesses on the jury is recognized by the Statute of Westminster the second, 13 Edw. I. stat. 1, c. 38, which provides that jurymen shall have certain property qualifications, but excepts from this provision "such as be witnesses in deeds or other writings, whose presence is necessary."

Until about the time of Henry VI., the jury continued to be witnesses. *About* that time occurred a most material change in the functions and constitution of juries. The earliest traces of evidence laid before juries appear in the reign of Henry VI., but it is apparent that, until some time afterwards, the functions of the jury and witnesses were not entirely separated, and the separation was not completely effected until the time of Edward VI. or Mary(*a*).

As to such evidence as the jury might have in their own consciences by their private knowledge of the facts, it long continued to be the doctrine of the courts that this had as much right to sway their judgment as the written or parol evidence produced before them; and even so late as 22 Car. 2, A.D. 1670, Chief Justice Vaughan, in the celebrated case of the imprisonment of Edward Bushell, a juryman, founded his judgment partially on the right of a juryman to communicate privately to his fellow-jurymen evidence which had not been produced in court(*b*). But the modern doctrine is, that if a juryman have a knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privily to the rest of the jury, but should state to the Court that he had such knowledge, and thereupon be examined, and subject to cross-examination as a witness(*c*).

It is to be remarked that while trial by jury grew into favour in trials at common law in the manner above described, it had by no means a corresponding growth in tribunals which adopted more generally the principles of the civil law. Even to the present day those tribunals proceed in a great many cases to determine questions of fact without the intervention of juries. In the Court of Chancery, as will be more particularly explained hereafter, the judges themselves determine the majority of such questions arising before them, and comparatively seldom leave such issues to the determination of juries. In the Ecclesiastical Courts,

(*a*) Reeves, Hist. of English Law, vol. ii. p. 271.
(*b*) Bushell's case, 6 State Trials, 1012.
(*c*) 6 State Trials, 1012, note; 3 Blackstone, 374.

also, the judges determine matters of fact as well as of law (*a*).

Another tribunal, in which the same persons act as judges and jury, is the highest criminal tribunal, the House of Lords, sitting as a court of criminal jurisdiction in Parliament upon the trial of Peers impeached or indicted. The collective body of Peers are at such trial judges both of law and fact, and the Lord High Steward votes with the rest in right of his peerage. But in the Court of the Lord High Steward, held in a *recess* of Parliament for the trial of an indicted Peer, the Lord High Steward is sole judge of matters of law, and the Lords Triors determine matters of fact only (*b*).

Other instances of courts in which the functions of judge and jury are united, are the tribunals hereafter to be described, which have summary jurisdiction of minor criminal offences, and the modern County Courts, where all questions both of law and fact are tried by a single judge, unless one or other of the parties expressly requires a jury.

By a recent alteration of the procedure of the Superior Courts of Common Law at Westminster, it is provided that by the consent of the parties to any cause in either of those courts, issues of fact may be tried by the judge without the intervention of a jury (*c*). This enactment is founded on the Common Law Commissioners' Second Report, where the arguments for and against the preservation of trial by jury in civil causes are fully examined. The Commissioners were of opinion that in a large class of cases the intervention of a jury was unnecessary, and in another class of cases was mischievous, from the inability of a jury to deal with them. The former class includes those cases in which the question turns on the legal effect of evidence or of undisputed facts, and in which the verdict of the jury necessarily

(*a*) See *infra*, Bk. II. Ch. 6.

(*b*) 4 Blackstone, 263, 349. So it was held by Lord Jefferies, Lord High Steward, on the trial of Lord Delamere, in 1686. (11 State Trials, 563.)

(*c*) Common Law Procedure Act, 1854; 17 & 18 Vict. c. 125, s. 1.

depends on the direction of the judge. The second class includes all those cases which it is found necessary to withdraw from the jury and submit to arbitration, such as actions involving complicated questions of account. With respect to such causes, the Act last cited gives (ss. 3 and 6) the judge a limited power of requiring compulsorily a reference to arbitration.

In Scotland all crimes, except petty offences, have for a long period been tried by jury(*a*). In 1815, after much opposition, a statute(*b*) was passed, by which trial by jury in civil causes was introduced into Scotland. By that statute the jury court was established, as subsidiary to the Court of Session, for the trial of such causes as the judges of the Court of Session might at their discretion remit for such trial. This Act was amended by 59 Geo. III. c. 35, which recites that the introduction by the former Act of the trial by jury in civil causes, had been found beneficial. By 1 Will. IV. c. 69, the separate jury court was abolished, and it was provided that the trials by jury required by the Court of Session should take place in that court(*c*).

ii. *The Constitution of Juries.*—We proceed now to consider more particularly the manner in which English juries(*d*) are constituted, confining the attention here to those ordinary juries which try issues of fact in civil and criminal causes. We shall, in the first place, advert to the provisions of the law on the subject, and having explained the present constitution of juries, shall refer to the history of various important changes in their constitution, and the evils which those changes were intended to remedy.

Until the Statute of Westminster, 13 Edw. I., st. 1, A.D. 1296, the only qualification of common jurymen was, that they should be true and lawful men. The statute in ques-

(*a*) Hutcheson's 'Treatise on the Offices of Justice of the Peace in Scotland,' vol. i. p. 167, where there is a history of jury trial in Scotland.

(*b*) 55 Geo. III. c. 42.

(*c*) 1 Will. IV. c. 69.

(*d*) Juries in Ireland are regulated by 3 & 4 Will. IV. c. 91.

tion, c. 38, recites that rich men were accustomed to give bribes to avoid serving on juries, which, consequently, were often composed of poorer men. To remedy the evil, the statute requires that the jurors shall be persons holding tenements of a specified value. Many other statutes were subsequently passed with respect to the qualifications of jurors, but these were all repealed by the Jury Act, 6 Geo. IV. c. 50, which consolidated the law respecting juries. The Act defines three classes of jurors, who are qualified to serve in criminal and civil causes alike:—(1) freeholders or copyholders, (2) leaseholders, (3) householders. The first must have £10 a year in land, or rent of land held in fee or for life. The second must have £20 a year in lands held by lease for twenty-one years or life. The third must be rated to the poor on a value of £20 (in Middlesex, £30), or occupy houses having as many as fifteen windows each. There are many exemptions enumerated by the Act. Among them are persons under the age of twenty-one years, or above that of sixty years, peers, judges, clergymen, dissenting ministers, barristers, advocates, and attorneys, &c., in actual practice, practising physicians and surgeons, officers of the army and navy on full pay, and persons holding various specified offices(*a*).

No man, not being a natural-born subject, is qualified to serve on juries, except juries *de medietate linguæ*, that is, where one-half of the jury is of the English tongue, and the other of a foreign one. The privilege of such a jury for the trial of foreigners is very ancient, and the statute 23 Edw. III. c. 13, enacts that where either party is an alien, the jury shall be one half denizens and the other aliens (if so many be forthcoming in the place), for the more impartial trial. This privilege the Jury Act, 6 Geo. IV., limits to cases of felony and misdemeanour. It does not exist as to cases of high treason; but the Crown may in such cases

(*a*) In boroughs having separate quarter sessions, the burgesses are qualified to be jurors, and are exempt from serving elsewhere in the county. (5 & 6 Will. IV. c. 76, ss. 121, 122.)

allow it. The aliens need not be of the same country as the prisoner, and if he neglect to demand the privilege before the jury are sworn, he cannot afterwards take exception to the proceedings(*a*).

The lists of persons qualified to serve on juries are annually made out by the churchwardens and overseers for their respective parishes, and are returned by them to be corrected and allowed by the justices of their counties in sessions held for the purpose. The lists are copied into the *jurors' book* to be used by the sheriff for one year(*b*).

For the trial of all issues, civil or criminal, by jury, either at assizes or quarter sessions, the sheriff returns a competent number of jurors, taken exclusively from the jurors' book for the current year(*c*).

In boroughs having their own sessions of the peace, all burgesses (subject to the exemptions and disqualifications above mentioned) are liable to serve on juries. The juries at borough sessions are summoned by the borough clerk of the peace(*d*).

The Court of Chancery also is empowered to issue precepts to sheriffs to summon juries for the trial of causes before that court, or for the assessment of damages before judges at *nisi prius*, or at the assizes(*e*).

Where the sheriff is not an indifferent person, as where he is related to any of the parties to a cause, the precept may be directed to the coroner instead; or if he be similarly objected to, to two *elisors*, or electors, who shall indifferently name the jury. And in such cases, the coroner or elisors must return names of persons in the jurors' book of the current year(*f*). It may be observed, however, that the functions of the sheriff with respect to the return of jurors are now so much less important than formerly, that objections to the sheriff returning the juries have long ceased to be made.

(*a*) 3 Blackstone, Comm., 360; Archbold, 'Pleading in Criminal Cases,' 136.

(*b*) 6 Geo. IV. c. 50, s. 12.

(*c*) 6 Geo. IV. c. 50, s. 14.

(*d*) 5 & 6 Will. IV. c. 76, s. 121.

(*e*) 21 & 22 Vict. c. 27, ss. 3, 6.

(*f*) 3 Blackstone, 355; 6 Geo. IV. c. 50, s. 14.

Persons indicted of high treason or misprision of treason (except in cases of direct attempts against the King's person) are entitled to lists of the petty jury some time before their trial; but this privilege is not given to persons indicted for felony (*a*).

Special juries may be summoned in *civil* causes which are deemed of too great intricacy or importance to be tried by common juries, and in important cases of *misdemeanour*. The Jury Act of George IV. above mentioned, authorizes the superior common law judges, on the application of either party in any case, civil or criminal (except cases of treason and felony), to appoint a special jury to be struck. The special jurors are those described in the jurors' list as of the degree of esquire or upwards, or as bankers or merchants (*b*).

In every case of trial by common jury, the names of all the panel are written on separate tickets, which are drawn at random from a box. The twelve persons whose names are first drawn out of the box are sworn upon the jury, if none of them be absent, challenged, or excused. Special juries also are balloted for, and called in the order in which numbers corresponding to their names on the panel are drawn from the ballot box (*c*).

Challenges are of two kinds; challenges to the *array*, and challenges to the *poll*.

Challenge to the *array* is an exception to the whole panel, on account of partiality or some default in the sheriff or his officer who arrayed the panel. The ground of objection must be specifically stated in the challenge, and the opposite may either *demur* to the challenge, this is, deny its sufficiency in law, or *traverse* it, that is, deny the fact

(*a*) 4 Blackstone, 352; 6 Geo. IV. c. 50, s. 21.

(*b*) 6 Geo. IV. c. 50, s. 31.

(*c*) *Ibid.* ss. 26, 32; 16 & 17 Vict. c. 76, s. 110.

The method of selecting jurors by ballot existed also under the statute 6 Geo. II. c. 25, by which the return of common juries in civil and criminal cases was formerly regulated. The importance of the changes introduced by that statute will be seen in a subsequent part of this chapter.

alleged in the challenge. In the former case it is determined by the court; in the latter, by two *triers* appointed by the court, who are sworn to try the disputed facts and hear evidence, the arguments of counsel, and the summing up of the judge, as on an ordinary trial. If the triers find in favour of the challenge, the trial is adjourned, and a fresh jury may be summoned. If the triers find against the challenge, the trial proceeds as if no challenge had been made. Challenges to the array may be made in civil causes by either party, and in criminal causes either on the part of the Crown or the prisoner(*a*). In the case of O'Connell and others *v.* the Queen, in the House of Lords, the majority of the Lords who decided the appeal were of opinion that since the principal functions of sheriffs with respect to the summons of juries have been taken from them, and transferred to other officers, challenges to the array are applicable to acts and defaults of the latter(*b*).

Challenges to the Poll (*in capita*) are exceptions to particular jurors, either that they are disqualified by the laws defining the qualifications of jurors, or that they are disqualified by some crime or misdemeanour that renders them infamous, or on suspicion of partiality. This last ground may be taken where there are manifest reasons of suspecting partiality (*e.g.* that the juror is of kin to one of the parties), in which case the challenge is called a *principal* challenge; or may be taken where the circumstances of suspicion are not manifest, but probable only (as acquaintance or the like), in which case the challenge is said to be *to the favour*. The validity of this challenge is left to the determination of triors, whose office it is to determine whether the juror be favourable or unfavourable(*c*).

Challenges for any of the foregoing reasons are called challenges for cause, which may be without stint in both civil and criminal trials. But in criminal cases another kind

(*a*) Butler's Co. Litt. 156 *a*, and notes, *ibid.*; 3 Blackstone, 359; Archbold, 'Pleading in Criminal Cases,' 140.

(*b*) 11 Clark and Finnelly's Reports, 155. (*c*) 3 Blackstone, 363.

of challenge is also allowed, namely, *peremptory* challenges, which are allowed to all persons indicted of felonies and capital offences, but not on trials of misdemeanour. Where the prisoner challenges peremptorily, he is not obliged to show any cause of objection against the juror; but he may not challenge peremptorily more than thirty-five persons, that is, one under the number of three full juries, in cases of high treason, nor more than twenty in cases of murder or other felony. The Crown has also a certain right analogous to that of the prisoner's peremptory challenge, as follows:—the Crown shall challenge no jurors without cause, but need not assign the cause of challenge till all the panel is gone through; nor if there can be a full jury without the persons so challenged(*a*). Where, by means of challenges or from other causes, a sufficient number of jurors do not appear, the defect may be supplied by a *tales de circumstantibus*, *i.e.* so many of the bystanders as are necessary to make up the number twelve. In criminal cases it is not the practice to award a *tales;* but where the panel has been exhausted, the judge may order the sheriff to return a panel *instanter* without further precept(*b*).

Having thus described with a sufficient minuteness for our present purpose the constitution of juries, we proceed to consider the history of some of the principal changes of that constitution, and the evils which those changes were intended to remedy. This review will materially illustrate the importance of some of the provisions just stated.

Anciently, and until the reign of William III., the principal power and responsibility of selecting juries belonged to the sheriffs. The functions of the sheriffs with respect to the formation of juries, are now almost entirely superseded by the system introduced a few years after the Revolution, by which the sheriff is required to return jurors from lists transmitted by the justices in quarter sessions; but previously the partial exercise of the sheriff's powers, with respect to the formation of juries, was but imperfectly guarded

(*a*) 4 Blackstone, 353; 6 Geo. IV. c. 50, s. 29. (*b*) Archbold, 143.

against by the privilege of challenging the array (*a*). And accordingly we find that the court party, in the time of Charles II., attached great importance to the election of the sheriffs themselves. This was one principal cause of the proceedings in the great *Quo warranto* case, in 34 Car. II., A.D. 1682, taken by the Crown in order to procure the forfeiture of the charters of the City of London, which had previously exercised the right of appointing its own sheriffs. Roger North, a most unscrupulous partisan of the court, speaking of the elections of the municipal officers of the city in the previous year, says that the "factious party" did not much oppose the election of the Lord Mayor, because "his office did not affect the return of juries, which was their palladium: therefore they did not unite as one to exclude him, as they did to carry the choice of sheriffs" (*b*). And in his history of the *Quo warranto* case, in allusion to the power of grand juries to ignore indictments prosecuted by the Crown, he says, "This great city was amongst the earliest that were questioned at law for forfeiture; and I shall venture to say with more reason than any other in England. For what, in the name of justice, had the Government to do when Ignoramus was mounted *in cathedrâ*, and there was a declared stop put to

(*a*) Harris, in his 'Life of Cromwell,' notices that "Cromwell made use of packed juries on occasion, and displaced judges for refusing to follow his directions." He adds, in a note, "Here are my proofs. When Judge Hale was on a circuit, he understood that the Protector had ordered a jury to be returned for a trial in which he was more than ordinarily concerned. Upon this information he examined the sheriff about it, who knew nothing of it; for he said he referred all such things to the under-sheriff; and having next asked the under-sheriff concerning it, he found the jury had been returned by order from Cromwell, upon which he shewed the statute that all juries ought to be returned by the sheriff or his lawful officer; and this not being done according to law, he dismissed the jury, and would not try the cause, upon which the Protector was highly displeased with him, and at his return from the circuit, he told him in anger he was not fit to be a judge. To which all the answer he made was, that it was very true." ('Historical and Critical Account of the Lives and Writings of James I.,' etc., by William Harris, vol. iii. p. 443 (ed. 1814), where some other proofs to the like effect are cited.)

(*b*) 'Examen,' part iii. ch. 8, § 20.

all state criminal law, to say nothing of the ordinary and civil law course, and how factiously partial it was carried on in London and Middlesex?"(*a*). Charles II., after he had obtained judgment against the city, offered to restore its charters upon several conditions, a principal one of which was that if he should "disapprove of the persons chosen to be sheriffs or either of them, his Majesty may appoint persons to be sheriffs for the ensuing year." But the City refused to accede to his terms(*b*).

The sheriffs, who in almost all the counties were nominated by the Crown(*c*), had, as we have said, great power at the period here considered, of forming juries favourable to the Crown interests. One of the recitals of the Bill of Rights, 1 W. & M. sess. 2, c. 2, is that "of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders." Some important amendments in the law respecting juries were made in the reign of William III.(*d*); but complaints respecting the constitution of juries continued in that reign, and long afterwards. For example, Peter Cook, on his trial for high treason, in 8 Will. III., A.D. 1696, com-

(*a*) 'Examen,' part iii. ch. 8, § 59.

(*b*) 8 State Trials, 1282.

Speaking of the atrocious trial of Colledge for high treason, in 1681, North says, "It was determined thereupon, that since the justice of an indictment was denied by the Middlesex grand jury, to proceed to indict and try Colledge in Oxfordshire. . . . It is not to be conceived what a thunder-clap it was for the faction to hear that a prime instrument of theirs should be brought to answer, much more to be attaint of treason. They thought their whole party safe ensconced behind the sheriffs of London and Middlesex, with their partisans of Ignoramus, and that the law was enervous as to them." (Examen, part iii. ch. 7, §§ 8, 9.)

(*c*) Until very recently, the office of sheriff of the county of Westmoreland was hereditary, but by 13 & 14 Vict. c. 30, the appointment is vested in the Crown. The City of London appoints the sheriffs of London and Middlesex. (See *infra* in this chapter.)

(*d*) Particularly the Act 4 & 5 W. & M. c. 24, s. 15, respecting the property qualification of jurors; 7 & 8 W. & M. c. 32, which provides (s. 4) that the sheriff shall return juries from lists received from the justices in quarter session.

plained that the sheriff had arranged the order of the names on the panel from which the jury was to be selected, in such manner that the names of those who were supposed to be favourable to the prisoner stood last, and were therefore not likely to be called. The sheriff solemnly, and apparently sincerely, denied any such design, and the judges expressed themselves satisfied that he was innocent of it(*a*). But such a complaint ought not to be even possible; and it was rendered impossible by the statute 3 Geo. II. c. 25, by which, at a trial by jury, the names of jurors on the panel are to be called in the order in which they are drawn by chance, by the proper officer, from a ballot-box(*b*).

Again, in the proceedings by the Crown against John Horne, afterwards Horne Tooke, for libel, in 1777, he made a somewhat similar complaint that the jury was not chosen indifferently. The trial was by a special jury, which was struck by taking names from the general jury-list. The defendant complained that the names were not chosen indifferently in the order in which they stood in the list, but that the agents of the Crown procured names to be passed over on false representations that they were names of persons deceased or disabled from serving on the jury(*c*). Whether the complaint were just or not, it could not be repeated now; for by the law now in force, 6 Geo. IV. c. 50, ss. 31, 32, all the names on the special jurors' list are consecutively numbered; the numbers are separately written on pieces of parchment or card, and put in a ballot-box, and the forty-eight persons from whom the special jury is selected, are those whose names correspond to the forty-eight numbers first drawn from this box.

The last instance of complaints respecting the constitu-

(*a*) 13 State Trials, 324.

(*b*) The principle introduced by the statute 7 & 8 W. & M. c. 32, of requiring the justices in quarter sessions to transmit to the sheriffs lists of persons qualified to be jurors, was materially extended by this statute of George II., which gives the justices power to insert or strike out names improperly omitted or inserted in the jury lists.

(*c*) 20 State Trials, 690.

tion of juries, to which we shall here advert, is one which occurred in a case which involved questions of great constitutional importance—the appeal of O'Connell and others *v.* the Queen, in the House of Lords in 1844. The appellants had been indicted for conspiracy, and upon their trial by jury in Dublin had made a challenge to the Array. The ground of the challenge was this:—According to the law, 3 & 4 Will. IV., c. 91, which regulates juries in Ireland, various lists of persons qualified to serve on juries were required to be made by collectors, and sent to the Recorder, who from such lists was to make out one general jury list: the complaint was, that this general list did not contain all the names in the lists sent in by the collectors, but that many names were fraudulently omitted. The English judges who were consulted by the House of Lords upon the Appeal, were of opinion that a challenge to the array is to be allowed, on account of "unindifferency or default of the *sheriff*" only; but that, in the present cases there was no blame imputed to him. The majority of the law Lords, however, who decided the appeal, took a broader view of the right of challenge to the array, and considered that the right was not impaired by the circumstance that modern legislation had taken from the sheriffs many of their functions respecting juries, and given them to other officers; but that those who now take part in what would have been the sheriff's duties at common law, are included, for the purpose of challenge, under the term "sheriff" (*a*).

The extreme caution of the English law to avoid the improper constitution of juries, has been the subject of frequent encomium by our jurists and foreigners. "We may here again observe, and observing, we cannot but admire," says Blackstone, "how scrupulously delicate, and how impartially just, the law of England approves itself in the constitution and frame of a tribunal, thus excellently contrived for the test and investigation of truth; which appears most remarkably—1. In the avoiding of frauds and

(*a*) 11 Clark and Finnelly's Reports, 155.

secret management, by the electing the twelve jurors out of the whole panel by lot; 2. In its caution against all partiality and bias, by quashing the whole panel or array, if the officer returning is suspected to be other than indifferent, and repelling particular jurors, if probable causes be shown of malice or favour to either party;" (*a*) and, it may be added, by allowing a right of peremptory challenge in certain criminal cases. De Lolme remarks that "those persons to whom the law has thus exclusively delegated the prerogative of deciding that a punishment is to be inflicted—those men without whose declaration the executive and judicial powers are both bound down to inaction, do not form among themselves a permanent body, who may have had time to promote their private views or interests; they are men selected at once from the people, who perhaps never were before called to the exercise of such a function, nor foresee that they ever shall be called to it again. As the extensive right of challenge effectually baffles on the one hand secret practices of such as in the face of so many discouragements might still endeavour to make the judicial power subservient to their own views, and, on the other, excludes all personal resentments, the sole affection which remains to influence the integrity of those who alone are entitled to put the public power into action during the short period of their authority, is, that their own fate as subjects is essentially connected with that of the men whose doom they are going to decide. In fine, such is the happy nature of this institution, that the judicial power, a power so formidable in itself, which is to dispose, without finding any resistance, of the property, honour, and life of individuals, and which, whatever precautions may be taken to restrain it, must be in a great degree arbitrary, may be said in England to exist to accomplish every intended purpose, and to be in the hands of nobody" (*b*).

The excellence of trial by jury consists, however, not

(*a*) 3 Blackstone, 365.

(*b*) De Lolme on the Constitution, book i. ch. 13.

only in the manner in which juries are constituted, but also in several other particulars. One of the principal of these is the separation of the functions of the jury from those of the judges, and of the witnesses. Both these topics have been already considered in this chapter. We have seen that the law carefully discriminates between the determination of pure questions of law by the judge, and the determination of pure questions of fact, or mixed questions of law and fact, by the jury; and that the jury are now required to base their verdict, not on their own private knowledge, but on the evidence produced before them. It cannot be doubted that this separation of the functions of the jurors from those of the witnesses was a most important improvement of the original scheme of trial by jury.

iii. *The manner in which verdicts are given.*—The whole proceeding of trial by jury takes place under the superintendence of the presiding judge or judges, by whom are usually decided all points as to the admissibility of evidence, and the jury are directed on all points of law arising on the evidence, so far as is necessary for their guidance in appreciating its legal effect, and drawing the correct conclusion in their verdict. After hearing the evidence, the addresses of counsel, and the charge of the judge, the jury pronounce their *verdict*, which the law requires to be *unanimously* given.

This necessity of a total unanimity seems peculiar to English law, and is by no means universally required even in the tribunals of this country. Thus, on the trials of indicted or impeached lords by their peers, the verdict is that of the majority of peers(*a*). So also in trials by court martial, and in criminal trials in Scotland(*b*), the majority in opinion determine the verdict. Writers on military law argue that such verdicts have thus an advantage over those delivered by ordinary juries, because, in the latter, some

(*a*) 4 Blackstone, 349.

(*b*) Barrington, Observations on the Statutes, Magna Charta, ch. 29.

of the jury must frequently surrender their own opinions, whereas the verdicts of court martial are the real opinions of the majority.

In comparing the two systems, two distinct questions arise,—the one as to the intrinsic value of the verdict, the other as to the moral propriety of requiring dissentient jurors to surrender their own opinions.

With respect to the intrinsic value of the verdict, it is to be observed that, supposing the jurors' opinions to be all of equal weight, the probability of the correctness of the verdict of a given number of jurors is greater, as the number of dissentients is less. But the ratio of the dissentients to the whole number of the jurors is usually very small in the case of ordinary juries, and is often very considerable in trials by court-martial, and in the House of Lords(*a*).

Next, as to the moral propriety of requiring the dissentient jurors to surrender their opinions. It cannot be disputed that a juror, who is thoroughly convinced of the accuracy of his own opinion, cannot surrender it without violating his oath. The only case in which he can properly yield to the opinion of the majority of the jurors is when he is doubtful of the accuracy of his own; and, strictly speaking, the law does not require him to surrender his convictions, though it must be confessed that, formerly, considerable severity was occasionally exercised to procure a unanimous verdict.

This unanimity was not, indeed, required in the original institution of juries in civil causes. Bracton, speaking of

(*a*) In Sir John Fenwick's case, which (though a case of attainder by bill passing through both Houses) was in effect a judicial proceeding, in which each House discharged the functions of a jury, the number for passing the bill was, in the House of Commons, 189, and against the bill, 156; in the House of Lords the corresponding numbers were 66 and 60. (13 State Trials, 749, 755.)

On the trial of Stafford, one of the "Five Popish Lords," in the House of Lords, in 1680, the numbers were, for finding him guilty, 55, not guilty, 31. (7 State Trials, 1553.)

the procedure in his time, the reign of Henry III., about the year 1260, has a passage which, in English, is to the following effect:—"It happens often that the jurors disagree when they come to deliver their verdict; in which case, by direction of the court, the jury (assize) may be increased by the addition of others equal in number to the majority who disagree, or, at least, four or six; and these are joined to the rest, or by themselves without the rest, discuss the verdict, and answer by themselves, and the verdict of those with whom they agree shall be allowed, and hold good"(*a*).

This continued to be the practice in the next reign, when "Fleta" is supposed to have been written. But the judge had a power of insisting upon the unanimity of the first jury impannelled, and as it was probably found that the addition of new jurors involved the trouble of trying the cause over a second time, and so *toties quoties*, at last, for greater dispatch of business, the judges insisted in all cases upon the unanimity of a jury(*b*).

In criminal cases the practice was different. It seems clear, from comparison of authorities, that in such cases no verdict was taken without the concurrence of all the jurors,

(*a*) "Contingit etiam multotiens quod juratores in veritate dicendâ, sunt sibi contrarii, ita quod in unam declinare non possunt sententiam. Quo casu, de consilio curiæ affortietur assisa, ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor vel sex, et adjungantur aliis; vel etiam per se ipsos, sine aliis, de veritate discutiant et judicent et per se respondeant; et eorum veredictum allocabitur et tenebit cum quibus ipsi convenerint." (Bracton, De Legibus, lib. iv. de Assisa novæ Disseisinæ, cap. 19; see, also, 1 Reeves, Hist. of English Law, p. 330.)

(*b*) Fleta lays it down for law that when there was a difference of opinion among the jurors, it was at the election of the judge either to afforce the assize by adding to the number of jurors, or to compel agreement by directing the sheriff to keep them without meat or drink until they were all agreed in the verdict. (2 Reeves, 268.)

The taking a verdict *ex dicto majoris partis juratorum*, though conformable with the old practice, began to go out of use towards the end of the reign of Edward I.; for in the fortieth year, when eleven gave their verdict without assent of the twelfth, they were fined by the justices. (3 Reeves, Hist. of English Law, ch. 16, p. 105.)

and such unanimity is expressly required by Fleta. If they all declared upon their oaths that they knew nothing of the fact, others were to be put in their place who did know it(*a*).

Coke says, "By the law of England, a jury, after their evidence given upon the issue, ought to be kept together in some convenient place without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any unlesse it be the bailiffe, and with him onely if they be agreed. After they be agreed, they may, in causes between party and party, give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drinke; and the next morning, in open court, they may either affirme or alter their privy verdict, and that which is given in court shall stand. But in criminall cases of life and member, the jury can give no privy verdict, but they must give it openly in court(*b*). And hereby appeareth another division of verdicts, viz. a publique verdict openly given in court, and a privy verdict given out of court, before any of the judges, as is aforesaid. A jury sworne and charged in cases of life or member, cannot be discharged by the court or any other, but they ought to give a verdict"(*c*).

This doctrine, however, that a jury, charged in case of life and member, cannot be discharged, is too broadly put by Lord Coke, and has been overruled; and it is now es-

(*a*) 2 Reeves, Hist. of Eng. Law, 269.

(*b*) In Scotland, formerly, the verdict of the jury was delivered by their chancellor, and the jury could not separate till the verdict had been committed to writing and sealed up. Now, however, the practice of written verdicts is almost entirely put an end to by 9 Geo. IV. c. 29, s. 15, which enables a single judge to remain in court to receive the verdict. (2 Ellis on Criminal Law, 637.)

(*c*) Co. Litt. 227 *b*. "And it has been held," says Blackstone, "that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart." (3 Comm. 376.) See, to the same effect, 2 Hale, 297; 1 Vent. 97; see also, in Bushell's case, one of the cases cited near the end of the judgment. (Vaughan's Rep., p. 151.)

tablished that the discharge of the jury is a matter for the consideration of the judge at the trial, but he will not discharge the jury unless a strong case of necessity appear for his doing so(*a*). The modern practice of discharging juries who cannot agree upon their verdicts appears to have removed the moral objections to the rule requiring verdicts to be unanimous.

In Scotland, at the time when the measure above referred to (55 Geo. III. c. 42), for introducing trial by jury in civil causes in that country was in progress, many petitions were presented to Parliament, insisting that it would be often impossible for a jury to give a unanimous verdict unless some of the members violated their oaths. To meet this objection it was provided by the Act that, if the jury were not unanimous after twelve hours' consideration, they might be discharged, and a new trial granted.

The Common Law Commissioners, in their second report (April 30, 1853), supported the unanimity of verdicts, but recommended that the jury should not be debarred from refreshments while considering the verdict.

iv. *The effects of verdicts.*—Formerly, in civil cases, if the verdict were notoriously wrong, the jury might in many cases be punished, and the verdict set aside by proceedings under a *writ of attaint*. The jury who tried the former verdict was a grand jury of twenty-four, and if they found the verdict to have been false, the former jurors were subject to forfeiture and other severe penalties, which were, however, mitigated by later statutes. But the practice of setting aside verdicts, and granting *new trials* in civil causes, superseded attaints, which were very rare after the sixteenth century, and are now entirely abolished(*b*).

(*a*) Archbold, Pleading in Criminal Cases, 150.

(*b*) 3 Blackstone, 403; 6 Geo. IV. c. 50, s. 60.

Blackstone says (4 Comm. 361) that the verdict in criminal cases also might be set aside by attaint at the suit of the King, and not at the suit of the prisoner; and he cites as his authority 2 Hales, Pleas of the Crown,

A new trial can never be obtained except on such grounds as manifestly tend to show that the discretion of the jury has not been legally or properly exercised; for it is a great principle of law that the decision of a jury upon an issue of fact is in general irrevocable. Among the grounds on which the superior courts grant new trials of causes in those courts are—misdirection of the judge at the former trial; a verdict contrary to the evidence; the discovery of material facts since the trial; excessive damages; or misconduct of the jury. Another equivalent proceeding for re-trying a cause, though distinguished by a different technical name(*a*), is grounded on *irregularity* in the former proceedings, as where the jury has been improperly chosen, or has given an ambiguous or defective verdict(*b*).

In criminal cases, where the jury has found the prisoner guilty, their verdict has sometimes been mercifully set aside, and a new trial granted; but there is no instance of a new trial where the prisoner has once been acquitted(*c*).

It is to be observed that appeals from inferior to superior tribunals of common law lies upon *matters of law* only. Now that attaints of verdicts are abolished, there is no method of reversing an error on the determination of *facts* but by a *new trial.* This principle has not, however, always prevailed with respect to the highest court of appeal, the House of Lords; but in modern times there is no example

310. Hale expressly says (loc. cit.) that in criminal cases "the King may have an attaint," and "a man convicted upon an indictment can have no attaint."

There is a passage, however, in Hawkins's 'Pleas of the Crown,' book i. c. 72, from which it is clear that that writer thought that attaint lay only only in civil causes.

Barrington, in his 'Observations on the Statutes,' says it appears by 15 Hen. VI. c. 5 that in every attaint there were thirteen defendants, viz. the twelve jurors and the plaintiff or defendant who obtained the verdict. Therefore, if the verdict were given in favour of the Crown, no attaint could be brought, because the King could not be joined as a defendant with the jury who were prosecuted. (4to ed. 1766, p. 410 *n.*)

(*a*) Venire facias de novo. (*b*) Stephens on Pleading, ch. 1.

(*c*) 4 Blackstone, 361.

of a writ of error brought there from any of the courts of law on mere matters of fact(*a*).

In civil cases at law in which issues of fact are determined by juries, the verdict pronounced by the jury is usually followed by a consequent *judgment* awarded by the judges. Usually there is an interval of some days between the verdict and the judgment, and therefore between the verdict and the execution of the judgment. But the judge who presides over the trial by jury may order immediate execution in a proper case, as where there is danger of a party absconding or making away with his property; or the judge may postpone the execution beyond the usual time in a proper case, as where he entertains substantial doubt whether the verdict will stand(*b*).

There are certain cases in which judgment does not follow as a necessary consequence of the verdict. These are cases in which, for technical reasons, which it is not necessarily to state in detail, either party is able to show that there ought to be an *arrest of judgment* on account of error in the proceedings, or where a plaintiff claims the judgment *notwithstanding the verdict* given for the defendant, and shows that it was on such an issue as does not entitle the defendant to the judgment. In some cases where the issue determined by the jury was immaterial, the parties are required to plead *de novo* for the purpose of obtaining a better issue(*c*).

In criminal cases, if the jury acquit a prisoner he is entitled to his immediate discharge without the payment of any fees(*d*). Upon a conviction of a capital or inferior offence, the prisoner may offer exceptions in arrest of judg-

(*a*) 3 Blackstone, 407; Macqueen, Appellate Jurisdiction, 362. Hale (Jurisdiction, p. 152, ch. 27) says he never knew error in fact assigned upon a writ of error in Parliament, but, supposing in such a writ error in fact were assigned and put in issue, he thinks the regular way would be to send it to the King's Bench to be tried.

(*b*) Common Law Procedure Act, 1852, s. 120.

(*c*) Stephens on Pleading, ch. 1.

(*d*) 14 Geo. III. c. 20, s. 2; 8 & 9 Vict. c. 114, s. 1.

ment, as for insufficiency in the indictment in material particulars; and though the prisoner omit to move to arrest judgment, the court, if satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest judgment. If judgment be arrested, all the proceedings are set aside; but that is no bar to a fresh indictment. Questions of law arising on motions in arrest of judgment may be reserved by the judge to be determined by the Court of Criminal Appeal(*a*).

v. *Immunities of juries.*—No one is liable to any prosecution whatever in respect of any verdict given by him in a criminal matter. On this point the following observations of a very eminent authority are well deserving of consideration:—"Since the safety of the innocent and punishment of the guilty doth so much depend upon the fair and upright proceeding of jurors, it is of the utmost consequence that they should be as little as possible under the influence of any passion whatsoever. And therefore, lest they should be biassed with the fear of being harassed by a vexatious suit for acting according to their conscience (the danger of which might easily be insinuated where powerful men are warmly engaged in a cause thoroughly prepossessed of the justice of the side which they espouse), the law will not leave any possibility for a prosecution of this kind. It is true indeed the jurors were formerly sometimes questioned in the Star Chamber for their partiality in finding a manifest offender not guilty; but this was always thought a very great grievance, and surely, as the law is now settled in Bushell's case, there is no kind of proceeding against jurors, in respect of their verdicts in criminal matters, allowed of at this day"(*b*).

In former times we find many instances of juries punished or threatened for their verdicts; for example, in the first year of Mary's reign, A.D. 1554, when Sir Nicholas

(*a*) Archbold's Pleading in Crim. Cases, 151, 159.
(*b*) Hawkins, Pleas of the Crown, book i. ch. 72.

Throckmorton was accused of high treason for his participation in Wyatt's rebellion, and acquitted, the Court, dissatisfied with their verdict, committed the jury to prison, and after some months' imprisonment they were sentenced by the Star Chamber to pay heavy fines. This rigour, says Rapin, was fatal to Sir John Throckmorton, who was found guilty on the same evidence on which his brother had been acquitted(*a*). In Elizabeth's time we find instances of jurors fined by the judges for acquitting persons accused of murder(*b*). During Cromwell's Protectorate, A.D. 1653, John Lilburne was tried for returning from banishment. The jury, having acquitted him, were summoned before the Council of State to answer for their conduct. The jury were severally interrogated as to the reason of their verdict, and for the most part refused to give any explanation. It does not appear that any further proceedings were taken against them(*c*). In the time of Charles II. Lord Croke fined a jury for acquitting persons accused of assembling at conventicles, and in another case for finding a prisoner guilty of manslaughter instead of murder, contrary to the direction of the court. In 1667, a committee of the House of Commons reported that several cases of restraints put upon juries by Lord Chief Justice Keeling were arbitrary and illegal. Keeling, at his own desire, was heard by the House in his defence, and the House resolved "that they would proceed no further in the matter against him." A bill was brought in to declare the fining and imprisoning jurors illegal, but it did not pass(*d*).

Lord Chief Justice Hale, writing in the reign of Charles II., speaks thus of the growth of the practice in his time of fining juries:—"Though the late practice hath been for such justices to set fines arbitrarily, yea, not only upon grand

(*a*) History of England, book xvi., A.D. 1554.

(*b*) Wharton's case, 44 Eliz.; reported Yelverton's Reports, fol. ed. p. 23; Watts *v.* Brains, A.D. 1599; 1 Croke, p. 779, 5th ed. by Leach. In the latter case, however, there were circumstances of misconduct on the part of the jurors.

(*c*) 5 State Trials, 446.

(*d*) 4 Hatsell's 'Precedents,' 123.

inquests, but also upon the petty jury in criminal causes, if they find not according to their directions, it weighs not much with me for these reasons:—because I have seen arbitrary practices still go from one thing to another; the fines set upon grand inquests began; then they set fines upon petit juries for not finding according to the directions of the court; then afterwards judges of *nisi prius* proceeded to fine jurors in civil causes, if they gave not a verdict according to direction, even in point of fact." And then he proceeds to cite some instances in which the imposition of such fines in his own times had been overruled by himself, in concurrence with other judges(*a*).

This arbitrary system, however, received an effectual check by the judgment in Bushell's case, in 22 Car. II., A.D. 1670, in which Lord Chief Justice Vaughan distinguished himself by his profound argument in favour of the rights of juries. Penn and Mead, two quakers, were indicted in 22 Car. II., A.D. 1660, before the Mayor, Recorder, and Aldermen of London, for causing a tumultuous assembly in Gracechurch Street, and preaching to the people. There was evidence that Penn preached to the people, and that Mead was present; there was no evidence that the assembly was tumultuous, and Penn urged that he preached from a sense of his religious duties. The jury found Penn "guilty of speaking or preaching to an assembly," and Mead not guilty. The Recorder told the jury, "We will have a verdict, by the help of God, or you shall starve for it." After they had been locked up all night, their verdict was again demanded. The foreman replied, "William Penn is guilty of speaking in Gracechurch Street." *Mayor:* "To an unlawful assembly?" *Bushell:* "No, my Lord, we give no other verdict than what we gave last night; we have no other verdict to give." *Mayor:* "You are a factious fellow. I'll take a course with you." *An Alderman:* "I knew Mr. Bushell would not yield." *Bushell:* "Sir Thomas, I have done according to my conscience." *Mayor:* "That con-

(*a*) 2 Hales, Pleas of the Crown, p. 160; see also p. 311.

science of yours would cut my throat." *Bushell:* "No, my Lord, it never shall." *Mayor:* "But I will cut yours, so soon as I can." *Recorder:* "He has inspired the jury. He has the spirit of divination. Methinks I feel him. I will have a positive verdict, or you shall starve for it." In the end, the jury acquitted both prisoners, and were thereupon fined forty marks a man, with imprisonment till the fines were paid(*a*).

The jury were committed to prison, but were discharged upon proceedings of *habeas corpus* in the Common Pleas. Upon the return to the writ of *habeas corpus* in Bushell's case, Lord Chief Justice Vaughan elaborately showed that a jury could not be punished for an erroneous verdict, unless the error were wilful, and could not be punished for merely returning a verdict contrary to the direction of the judge(*b*).

This judgment greatly checked the practice of coercing juries, but the practice was not totally discontinued for some time afterwards. The grand jury in London ignored the indictment against Colledge, "the Protestant joiner," in 33 Car. II., A.D. 1681; "for which," says Kennet, "Mr. Wilmore, the foreman, was, out of all course of law, apprehended and examined before the Council, August 16, and sent to the Tower, and was afterwards forced to fly beyond the seas"(*c*).

(*a*) 6 State Trials, 951.

(*b*) Vaughan's Reports, fol. ed. p. 135; 6 State Trials, p. 967.

(*c*) Kennet, 'Life and Reign of King Charles II.,' p. 400.

North, in his Examen, part 3, ch. 8, § 13, angrily denies, with respect to Wilmore's apprehension, that it was for his conduct on the grand jury, but says that he was taken upon another charge. North allows, however, that that charge was preferred vindictively; for he says, "Wilmore, by his perjurous *ignoramus*, was not much recommended to his Majesty's favour" . . . and "Mr. Wilmore, and every one else of his bold usurpation, must look to their hits; for if they may, they will be caught napping."

When the judges of this period could no longer openly threaten juries for giving uncourtly verdicts, they could at least insult them. In 32 Car. II. A.D. 1680, we find Jefferies telling a grand jury that they were upon their oaths, and that they had committed perjury, which it was impossible for God from heaven to pardon. (7 State Trials, 943.)

3. COUNSEL AND ATTORNEYS.—In this country the persons allowed to advocate the causes of others in the superior courts of law and in the Court of Chancery are *barristers*, and, by a recent regulation, the *advocates* who formerly practised exclusively in the Ecclesiastical and Admiralty Courts. Barristers and Advocates are both often called "counsel," which is an abbreviation of "counsellor." We shall here consider, *first*, the manner of appointment of counsel; *secondly*, their office and immunities.

In England, though the particular degree and denomination of "barrister" is supposed by Blackstone not to be more ancient than 20 Edw. I., yet it appears that there were persons learned in the law, and skilful in pleading causes, at least as early as the reign of William Rufus; and Bracton makes express mention of *counsel*, *pleaders*, and *advocates* in the reign of Henry III. And not only were such professional persons employed, but the rule seems to have been established excluding all but regular advocates from pleading in causes in which they were not personally concerned(*a*).

It is supposed by Blackstone that the fixing of the Court of Common Pleas at Westminster, by the Magna Charta of John and Henry III., led to the establishment of the neighbouring Inns of Court as a legal university. In the reign of Edward I. there were two degrees conferred by this university,—the higher, that of serjeants (*servientes ad legem*), the lower of barristers. Serjeants are mentioned in the ancient Mirror of justices, and by Bracton, who wrote in the time of Henry III., and as early as any authentic records(*b*) exist are found practising in the Court of Common Pleas. The "coifs" which they wear were introduced, as it has been conjectured, to hide the tonsure of those clerics,

(*a*) Stephens on Pleading, xiv.

(*b*) "In the Norman jurisprudence, plaintiffs and defendants were allowed to plead in the superior courts by their 'conteurs,' the term 'conter' being applied indiscriminately to the pleadings of the plaintiff and those of the defendant. . . . The fees receivable by the 'countor' appear to have induced the Conqueror, or some of his more immediate successors, to treat

who, after the separation of the spiritual from the secular courts, remained in the latter. Serjeants are, by statute of Westminster the First, 3 Edw. I., prohibited from deceit(*a*).

Barristers are said by Blackstone to have been first appointed by an ordinance of 20 Edw. I. in Parliament. It is doubtful when barristers were first permitted to appear as advocates in Court, though their right is more modern than that of the serjeants. In the Common Pleas, in the reign of Edward IV., barristers might be heard to plead, but (probably) only when there were no serjeants(*b*). In 1574, in the reign of Elizabeth, by an Order of the Queen in Council (16 Eliz., A.D. 1574), it was provided as follows:—"Item, none to be admitted to plead at any of the Courts at Westminster, or subscribe any action, bill, or plea, unless he be a reader, or bencher in court, or five years' utter barrister, and continuing that time in exercise of learning, or a reader in Chancery two years at the least"(*c*). At the present time,

the office as a serjeantry in gross, and to assume, if they did not possess it before, the right of appointing to this serjeantry. This was effected by a royal mandate, issued in the most solemn form, under the Great Seal: by writ in respect of serjeants practising in the Aula Regia, and since in the Common Pleas; by letters patent in respect of serjeants practising in Dublin." (Manning's 'Serviens ad Legem,' Pref. ix.)

(*a*) Serjeant's case, 6 Bingham, New Cases, 232; 1 Blackstone, 24.

If any serjeant, pleader (*countre*) or other, do any manner of deceit or collusion in the King's Court, or consent unto it, in deceit of the Court, or to beguile the Court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and thenceforth shall not be heard to plead in that Court for any man. (3 Edw. I. c. 29.)

(*b*) 1 Blackstone, 24 *n*.

Blackstone, *loc. cit.*, says barristers were first called apprentices (from *apprendre*, to learn). It is clear that in the time of Edward IV. apprentices were a class distinct from the serjeants. In the case of Paston *v.* Genny (11 Edw. IV.) Littleton says, "If all the serjeants were dead, we could hear the apprentices plead here by necessity and in ease of the people." (Manning's Servions ad Legem, App. No. 38.) In the Serjeants' case, 6 Bingham's New Cases, 239, the date of this case is erroneously given as 2 Edw. IV. But Littleton was not appointed judge of the Common Pleas until 6 Edw. IV. (See Preface to Coke's 'First Institute.')

Dugdale (Origines Judiciales, cap. 41) says, serjeants were anciently called *countors* in French, and *narratores* in Latin.

(*c*) Dugdale, Origines Juridiciales, 312.

a barrister, immediately upon his call to the bar, is entitled to plead in court; and the distinction which formerly existed between inner and outer barristers is obsolete(*a*).

With respect to the Court of Common Pleas, until recently serjeants alone were entitled to plead there during term time; but a statute of 1846 gives barristers equal rights with serjeants of practising and pleading in that court(*b*).

The degree of barrister is conferred upon students of the four Inns of Court by the "benchers," by whom they are governed. Though these Inns are said to form a judicial university, yet there is not that union between them which exists between the colleges of our Universities. Each Inn calls its own members to the bar; whereas at Cambridge and Oxford degrees are conferred by the University and not by its colleges. All the power of the Inns of Court concerning admission to the bar is delegated to them from the judges, and the conduct of these societies is subject to the control of the judges as visitors(*c*).

(*a*) In Stow's "Annales, or a Generall Chronicle of England," fol. ed. 1631, Appendix, relating to the Universities in England, ch. 16, it is said of the students of the Inns of Court, that "after some yeares well imployed in the studie of their profession, viz. the Municipal Law of England, they obtaine the degree and stile of Inner Barristers; and at the seaven yeares ende, they proceed or become Outer Barristers, and are then said to be called to the Barre; and shortly after they are allowed to make publike profession and practise of the law in all courts, and to give counsel unto all clients, and hereupon they are also called counsellors at the law and learned counsell."

(*b*) 9 & 10 Vict. c. 54. In 1840, the Court of Common Pleas decided (in the case of the Serjeants-at-Law, 6 Bingham's New Cases, 232) that the exclusive right of serjeants to practise in that court was so established by usage that they could not be deprived of it by a Royal warrant of 1834, nor by any other authority than an Act of Parliament. Manning's 'Serviens ad Legem' contains a full report of the proceedings before the Judicial Committee of the Privy Council upon a petition by the serjeants to the Crown objecting that the warrant of 1834 was illegal.

(*c*) *Re* Hart, Douglas's Reports, 353. By the Order in Council, 13 Eliz. just mentioned, the reformation of the Inns of Chancery is referred to the benchers of their Houses of Court, "wherein they are to use the advice and assistance of the justices of the Courts at Westminster." Dugdale, in the

By recent statutes(*a*), the advocates of the Ecclesiastical and Admiralty Courts have been admitted to plead in the Courts of Chancery and Common Law. The advocates of the Admiralty Courts and the Arches Court, which is the principal Ecclesiastical Court of the province of Canterbury, are required to have taken the degree of Doctor of Laws, and are admitted in pursuance of a rescript of the Archbishop.

Queen's Counsel, or her Majesty's Counsel, learned in the law, are barristers who, by an honorary appointment as servants of the Crown, obtain certain rights of preaudience at the bar. They have a nominal salary as servants of the Crown, and must not be employed in any cause against its interest without special license of the Crown, which is however never refused. In all other causes in the Courts of Law and Equity, the right of Queen's Counsel to appear as advocates is not restricted by their appointment(*b*).

Secondly, as to the office and immunities of barristers. There is a distinction between the offices of the counsel and attorneys in English Courts, similar to that which prevailed between the patrons and procurators of the Roman law, and the *avocats* and *avoués* of the French bar(*c*). A

Origines Judiciales, cap. 70, gives several judges' orders for regulating the Inns of Court; some expressed to be made with the assent of their benchers, and some without their assent.

(*a*) 20 & 21 Vict. c. 77, s. 40, admitted advocates in the ecclesiastical courts to practise in the Court of Probate, and barristers to practise in contentious causes in the same court; and by an Act of 1858 (21 & 22 Vict. c. 95, s. 2) serjeants and barristers may practise in all causes and matters whatever in the Court of Probate; and by 22 & 23 Vict. c. 6, in the Court of Admiralty.

(*b*) 3 Blackstone, 27.

(*c*) At Rome, the functions of the bar were divided between (1) the Patroni, or orators, who argued in court; (2) the advocates, who attended to inform the patrons on points of law which arose in the cause; (3) the procurators, and (4) the cognitors. The last two nearly resembled the attorneys of our courts. Where a judicial proctor was appointed by a suitor to manage a civil suit or action at law, all acts in the progress of the cause were directed to the proctor instead of the suitor. (Butler's Co. Litt. 295 *a*, note 1; Hallifax on Civil Law, edited by Geldart, book iii. ch. 3.)

barrister does not usually receive his instructions from the suitor directly, but mediately through his attorney in Courts of Law, or his solicitor in Courts of Equity. The principal duties of a barrister in a cause are to argue on questions of law before judges, and to comment on evidence of facts before judges and juries, to examine and cross-examine witnesses where oral evidence is adduced, and to advise the clients on the steps to be taken by them in the progress of the cause. Barristers also in some cases prepare the written *pleadings*, by which, as a preliminary to the hearing of the cause, the nature of the questions in dispute is stated by the parties and recorded. Attorneys and solicitors do not argue in the superior courts, though they are allowed do so in some of the inferior courts. Their principal duties in a cause are to instruct counsel on behalf of their clients, to collect evidence, to serve and receive on behalf of their clients, notices, orders, and other like communications in the progress of the cause.

Formerly, in cases of felony, counsel for a prisoner were not allowed to address the jury on his behalf; they might however examine and cross-examine the witnesses, and argue points of law. But now, by statute 6 & 7 Will. IV. c. 114, all persons tried for felony may make full answer and defence by counsel. In all other causes, civil as well as criminal, all the parties are entitled to appear by counsel if they please(*a*).

The question is often asked—whether counsel are justified in advocating a cause which they believe to be unjust. The answer to the question depends on the nature of the issues in the cause. If they be issues of *law* only, the advocacy of counsel consists in citing authorities on the principles of law, and arguing upon them; and the judges being usually competent by their learning and ability to estimate the weight of the authorities and arguments, there seems to be no moral principle which forbids or limits the advocacy of

(*a*) See 4 Blackstone, 356, and note *ibid.* in the edition of Professor Christian.

counsel in purely legal questions, provided that they cite authorities fairly. The question as to the moral obligations of counsel is more frequently put in reference to issues of *fact*. To answer it in this case, we ought to consider how such issues are to be determined. It is a universal principle that they are to be determined upon the *evidence* produced in the cause; not upon unauthorized statements of counsel or any one else; but upon legitimate evidence, the admission and authentication of which are scrupulously regulated by strict rules of law. Neither judge nor jury ought to allow themselves to be influenced by any statement which is not strictly evidence, and in trials by jury it is one of the most important parts of the duty of the judge to confine the attention of the jury to the evidence, and of the contending counsel to prevent any statement of fact not warranted by the rules of evidence from being offered by their opponents. A juror, as we have seen, must not rely upon his own private knowledge, but, if necessary, must give evidence like any other witness. Nor ought a judge to give evidence of any fact which he knows of his own knowledge, unless he will be sworn for the purpose(*a*). The same rule applies to counsel; they may draw what inferences they please from the evidence actually produced, and the judge and jury are to estimate the correctness of those inferences; but counsel are not allowed to import into the cause unproved statements, or suggestions of fact.

Let us now regard the subject from another point of view—the consequences which would result in the administration of justice if counsel were permitted to defend those only whom they believe to be just and innocent. Is it not obvious that they would be arrogating to themselves the functions of judge and jury? The most effectual way of arriving at the truth in any controversy is to consider *all* that can be pertinently said on both sides of it. But

(*a*) On the trial of Colonel Hacker, one of the regicides, in 1660, two of the commissioners for the trial went from the bench to be sworn, and gave evidence. (5 State Trials, 1181.)

all that can be so said is less likely to be produced by a suitor not conversant with the rules of evidence and the practice of the courts, than by counsel familiar with both. "From the moment," says Erskine(*a*), "that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses from what *he may think* of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

In order to encourage due freedom of speech in the lawful defence of clients, it has been held that counsel is not liable for any matter by him spoken which is pertinent to the cause, and suggested by his instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause, he is then liable to an action from the party injured(*b*).

The right of counsel to plead against the Crown in matters affecting its rights and prerogatives, has long been established, though we find a few ancient instances in which counsel have refused to discharge their duty in this respect from fear of personal consequences(*c*). In the State

(*a*) Trial of Thomas Paine, 22 State Trials, 412.

(*b*) 3 Blackstone, 29.

(*c*) One of the most memorable instances of this sacrifice of the usual independence of the bar is the refusal of counsel to sign the answers of Bastwick, Burton, and Prynn to an information against them in the Star Chamber, in 13 Car. I., A.D. 1637, for seditious libels. (See 3 State Trials, 711.)

In the proceedings on *habeas corpus* brought by Sir Thomas Daniel, who

Trials a case is reported of Whitelocke, a barrister, prosecuted in the Star Chamber by Bacon, when Attorney-General, for a professional opinion given on a point of prerogative against the Crown. Whitelocke escaped punishment by signing a submission. On this case Mr. Hargrave remarks that "In the present age it would be deemed a monstrous doctrine to assert that lawyers are not at liberty to give opinions to their clients on questions of prerogative. Little apology can be made for such a doctrine even in Lord Bacon's time; for it was ever lawful for the subject to contest questions of prerogative in the King's courts; and if it was so, how could it be contrary to law to take the advice of counsel on such subjects? Indeed, Lord Bacon professes not to controvert the right of asking and giving counsel in law. . . . The true rule seems to be, that a barrister may give his opinion on every question relative to the King or his prerogative which the subject may contest with the Crown in a court of justice; but that in exercising this right he must keep so within the bounds of an opinion as not under the colour of it to obtrude either private or public scandal"(a).

If counsel were not free to advocate the political rights of their clients, it is clear that one of the greatest safeguards against arbitrary assumptions of illegal power—the right of free discussion in courts of justice—would be invaded. In this view, the privileges of advocates assume great constitu-

had been imprisoned, by warrant of the Attorney-General, in 3 Car. I., A.D. 1627, Daniel appeared by counsel, but stated that many counsel had refused his retainer, and that he could get none to be of counsel with him without the assistance of the Court. Hyde (Lord Chief Justice) and the Attorney-General thereupon both declared that no offence should be taken against counsel for advising Sir T. Daniel. (3 State Trials, 5.)

(a) 2 State Trials, 765. Cook, who had been of counsel against Charles I. in the "High Court of Justice," was tried as a regicide in 1660. Cook objected that he only acted as a counsellor, and did only speak words to have the written charge read, and demanded judgment against the King. The Court held that the delivery of the charge, of which he knew the contents, was an overt act of treason; and he was convicted and executed. (5 State Trials, 1072.)

tional importance. These privileges have been frequently attacked, not only by the Crown, but by other powers in the state. Thus, in the great dispute between the two Houses of Parliament in the case of Dr. Shirley's appeal, which involved the question of the appellate jurisdiction of the House of Lords, the Commons caused the counsel engaged in prosecuting an appeal in the House of Lords to be committed for breach of privilege. In the course of the struggle between the two Houses of Parliament with respect to the case of Ashby and White, in 1704, the House of Commons carried their resentment against the prisoners committed by the House so far as to order their counsel, as well as their solicitors, to be taken into custody. In their petition to Queen Anne, the House of Lords remarked on this transaction as follows:—"This seems to be so great an excess, that it is hard to find words for expressing it. When Cromwell committed Mr. Maynard to the Tower for assisting one Coney as his counsel, upon a *habeas corpus*, a celebrated author expresses the detestation due to such a fact, in these words: 'It was the highest act of tyranny that ever was seen in England. It was shutting up the law itself close prisoner, that no man might have relief from or access to it'"(*a*).

Attorneys at law answer to the *procuratores*, or proctors, of the civilians and canonists; and are they who are put in the stead or *turn* of suitors to manage their matters of law.

(*a*) Case of Privilege of Parliament on Doctor Shirley's appeal. (6 State Trials, 1122.) Proceedings in the great case of Ashby and White. (14 State Trials, 871.)

The case here referred to is that of Coney, a merchant, who resisted at law the payment of a tax imposed without the authority of Parliament. Ludlow relates that "Cromwel, resolving to put a stop to such dangerous precedents, caused the counsel for Mr. Cony, who were Serjeant Maynard, Serjeant Twysden, and Mr. Wadham Windham, to be sent to the Tower, where they had not been above three or four days, when they unworthily petitioned to be set at liberty, acknowledging their fault, and promising to do so no more." (Memoirs of Edmund Ludlow, Esq., Lieutenant-General of the Horse, vol. ii. p. 528.)

Many ancient statutes allow attorneys to be made to prosecute or defend civil suits in the absence of the parties; but in criminal cases the defendant must appear in person. Attorneys are admitted to their office by the superior courts of law; and those who are admitted by one of those courts may practise in the others(*a*). *Solicitors* are admitted in a similar manner to practise in the Courts of Equity. Attorneys are entitled to be admitted as solicitors, and solicitors to be admitted as attorneys; and by a recent statute both are now entitled to practise in the Ecclesiastical Courts(*b*).

The Common Law Judges and the Master of the Rolls appoint examiners to examine the fitness and capacity of persons applying to be admitted as attorneys or solicitors, and none are now admitted without examination(*c*).

The Statute of Westminster the second, 13 Edw. I. c. 10, was the first which gave general liberty to all persons of suing and defending by attorney. Before that time a special warrant from the Crown was required for the purpose. It appears also that long before 13 Edw. I. a party after *appearance* first made by himself in person in a suit, might appoint a responsalis, whose office resembled that of an attorney, to represent him during the subsequent progress of the cause(*d*).

The *proctors* of the Ecclesiastical Courts are agents in those courts for their clients, and stand in a similar relation to them to that of attorneys and solicitors to their clients at Common Law and in Equity respectively. The office of proctor is regulated by several statutes; and by a late statute(*e*), they are now allowed to practise in the courts of Common Law and Equity.

4. *Subordinate Officers of the Courts of Justice.*—The courts of justice are assisted in their functions by various

(*a*) 6 & 7 Vict. c. 73, s. 27.
(*b*) 20 & 21 Vict. c. 77, s. 45.
(*c*) 6 & 7 Vict. c. 73, ss. 16, 17.
(*d*) Stephens on Pleading, ix.
(*e*) 20 & 21 Vict. c. 77, s. 45.

subordinate officers, of whom some have *judicial* duties and some *ministerial* duties. It is not intended in this place to treat minutely of the powers of such officers, for the particulars respecting them belong properly to books treating of the practice of the several courts. It will be found, however, that the consideration of a few general distinctions between the machinery of the different courts tends very much to the elucidation of a subject which frequently perplexes an ordinary reader—the diversity of the jurisdictions of the courts themselves.

The officers of the courts may—as has just been suggested—be classified as judicial or ministerial officers. The former exercise discretionary powers, subject to the supervision of the courts; the duty of the latter is simply to carry into execution orders and decrees which delegate no discretion.

With respect to the former class, or judicial officers, it is important to observe that the functions are far less complex in the courts of Common Law than in the Court of Chancery. The judgments of Common Law courts are, as compared with the decrees of the Court of Chancery, extremely simple. This comparative simplicity arises principally from two causes—the one relating to the parties, the other to the remedies in the two kinds of courts. In the Common Law causes there are but two parties, or two sets of parties, the one directly opposed to the other. In the Court of Chancery, on the other hand, there are in many cases a multitude of parties, some of the defendants having the same interests as the plaintiffs, or only partially conflicting interests, and several defendants may have interests which conflict with each other. That court has therefore in such cases to *adjust* numerous rights by its decrees and orders; whereas at Common Law judgments in actions are given for plaintiffs or defendants absolutely, with respect to each subject of demand or complaint(*a*).

Again, the remedies given by Courts of Equity are often

(*a*) Stephens on Pleading, 298, 322; and see, as to joinder of causes of action, Com. Law Proc. Act, 1852, s. 41.

so complex as to require special machinery for the purpose of carrying them into effect; *e. g.* where the Court decrees partition of land between several parties(*a*), or requires them to execute deeds, which are to be settled out of court. But at common law, the judgment of the Court requires the performance of simple acts, such that an officer, having ministerial powers only, is able to compel obedience; *e. g.* where parties are required to pay money, restore property, or do, or abstain from doing, distinctly specified acts. The branches of common law jurisdiction last referred to are enforced by *mandamus*, commanding the fulfilment of duties, or *injunction*(*b*), against committal of injuries, and in both respects the powers of the courts are practically limited by the means at their disposal for compelling and arranging in detail the performance of their commands.

The principal judicial officers of the courts of Common Law are the Masters of those courts whose discretionary powers relate chiefly to taxation and determination of questions of costs(*c*), to inquiry respecting damages in some cases, where they are substantially a matter of calculation(*d*), and to the conduct of oral examinations in certain proceedings preliminary or subsequent to trials and judgments(*e*). The judges have also power, where matters in dispute are matters of mere account, and cannot be conveniently tried in the ordinary way, to direct that they shall be referred to an arbitrator appointed by the parties, or an officer of the court, or judge of a County Court(*f*).

The principal ministerial officer of the Courts of Common

(*a*) The common law process of partition by the sheriff and jury was attended by so many difficulties, where the titles were at all complicated, that it has long fallen into disuse, and is now abolished. (Mitford on Pleading, 120; Butler's Co. Litt. 169 *a*, note.)

(*b*) Com. Law Proc. Act, 1854, ss. 68–81.

(*c*) 6 & 7 Vict. c. 73, s. 37; 15 & 16 Vict. c. 76, s. 27.

(*d*) 15 & 16 Vict. c. 76, s. 94.

(*e*) Com. Law Proc. Act, 1854, ss. 46, 53, 60; and see, as to examination before the masters or prothonotaries of the common law courts, 1 Will. IV. c. 22, s. 4.

(*f*) Com. Law Proc. Act, 1854, ss. 3, 5.

Law is the *sheriff*, whose office and name are both of Saxon origin(*a*), the latter being derived from the words *shire gerefa*, the reeve or officer of the shire.

Sheriffs were formerly chosen usually by the freeholders of their shires. By 28 Edw. I. s. 3, c. 8, "the King hath granted unto his people that they shall have election of their sheriff in every shire (where the shrivalty is not of fee), if they list." But this was rather declaratory of an existing right, than the creation of a new one. By the subsequent "Statute of Sheriffs," 9 Edw. II. s. 2, the appointment of sheriffs is assigned to the Chancellor, Treasurer, Barons of the Exchequer, and Justices. By a long-continued custom, the judges and other great officers meet once a year in the Exchequer for the nomination of the sheriffs. The judges propose three fit persons for each county, and one of these is subsequently appointed by the Crown(*b*).

Besides the sheriffs of counties, there are some sheriffs of cities which, by ancient charters, are counties of themselves, and appoint their own sheriffs. The right of appointing the sheriffs of London, who are also sheriffs of Middlesex, was vested in the City of London by a charter of Henry I. (confirmed by John), on condition of their paying £300 a year to the King's exchequer(*c*).

(*a*) In each township among the Saxons, there was a Gerefa, Tun-Gerefa, or Reeve, who represented the Township in the Folkmoots or judicial assemblies. Like other names of officer and dignity, the word Gerefa was employed with much latitude, and applied to functionaries of very different ranks. (1 Palgrave's English Commonwealth, 81.)

(*b*) See, as to the validity of the appointment of sheriffs not previously nominated by the judges, 1 Blackstone's Comm., ed. by Stewart, ch. 9.

It was one of the articles of accusation exhibited in Parliament against Richard II. that, instead of sheriffs nominated by the King's officers, with his justices and others of the Council, he had made sheriffs not so nominated. (1 State Trials, 143.)

By the Act 3 & 4 Will. IV. c. 99, for facilitating the appointment of sheriffs, the appointment by the Crown of the sheriff of every county of England and Wales, except the County Palatine of Lancaster, is notified in the 'London Gazette,' and by a warrant signed by the clerk of the Privy Council, without any patent under the Great Seal.

(*c*) Atkinson's Sheriff-Law, 3rd ed. p. 3.

Coke says the sheriff hath a "triple custody, *triplicem custodiam*, viz.—First, *Vitæ justiciæ*, for no suit begins, and no processe is served, but by the sherife. Also, he is to returne indifferent juries for the triall of men's lives, liberties, lands, goods, etc. Secondly, *vitæ legis*, he is, after long suits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vitæ reipublicæ*, he is *principalis conservator pacis*, within the countie which is the life of the Commonwealth, *vitæ reipublicæ pax*" (*a*). The duties of the sheriff, with respect to the return of juries, have been considered in a former part of this chapter relating to juries (*b*).

At the time when Coke wrote the passage above quoted, and long subsequently, all actions in the Court of Common Pleas were regularly commenced by "original writs" addressed to the sheriff, and requiring him to cause the defendant to appear; but these writs are now almost entirely abolished. In all the superior courts of common law, if the defendant failed to appear, he was liable to have his goods attached, and in most cases to be himself arrested by the sheriff on *mesne* process, that is, process intervening before the end of the suit (*c*). But these methods are now nearly superseded. Arrest on *mesne* process is only allowed in certain cases of absconding debtors attempting to escape from this country; also where the Court is satisfied that a defendant evades service, it may permit the plaintiff to proceed as if service had been effected (*d*).

The duties of the sheriff relative to actions-at-law are now almost confined to the return of juries (already considered), and to the execution of the judgment of the Court. Where it requires the payment of money, the sheriff is empowered, by the appropriate writs of execution, to seize

(*a*) Co. Litt. 168 *a*.

(*b*) See also, as to the office of sheriffs, with respect to the return of members to Parliament, *ante*, p. 112.

(*c*) See 3 Blackstone, ch. 20.

(*d*) 1 & 2 Vict. c. 110, s. 3; Absconding Debtors' Arrest Act, 1851, 14 & 15 Vict. c. 52; Com. Law Proc. Act, 1852, s. 17.

the body of the defendant, or to seize and sell his chattels, or to give possession of his land to the creditor till the judgment is satisfied(*a*). Again, in those actions in which the judgment awards the possession of land, the sheriff enforces it. In those cases, again, in which, by the recent extension of common law jurisdiction, the Court directs specific performance of contracts or duties, the defendant, refusing to perform the acts required, is liable to *attachment* (which is a writ on which he is arrested by the sheriff), or the Court may order the acts to be done by the plaintiff, or some other person appointed by the Court, at the expense of the defendant. So, also, in cases of disobedience to "injunctions" above referred to, they may be enforced by attachment(*b*).

The sheriff has various duties with respect to the execution of sentences in criminal cases. The execution in capital cases is performed by his deputy. The gaols of every county (with some exceptions) are in the custody of the sheriff; and he appoints the gaoler, and is responsible for the safe custody of prisoners. But the management of gaols now principally devolves on the magistrates in general sessions, and is subject to the supervision of Inspectors of Prisons, and the Secretary of State for the Home Department(*c*).

In the Court of Chancery, as has been already observed, the judicial officers are far more numerous, and have a

(*a*) 1 & 2 Vict. c. 110. (*b*) Com. Law Proc. Act, 1854, ss. 73, 81.

(*c*) 4 Blackstone, 404. Gaol Consolidation Act, 4 Geo. IV. c. 64. Atkinson's Sheriff-Law, sect. 8.

It is not intended in this place to refer to all the ministerial offices of the common law and criminal courts, but the following may be mentioned on account of their importance:—*Clerks of Assize*, who accompany the judges on circuit, and perform ministerial acts of the court, such as issuing subpœnas and other processes, and recording its proceedings. *Clerks of the Peace*, who perform analogous duties in every county and place where quarter sessions are held (see Dickinson's Quarter Sessions, ch. 2. sect. 4). In the courts at Westminster the proceedings are recorded by the Associates of each court. (Chitty, Archbold's 'Practice of the Court of Queen's Bench,' chap. 3, where there is an account of the immediate officers of the courts of law.)

much larger share in the business of the Court, than is the case at Common Law. It will be convenient, however, to postpone the account of the judicial officers of the Court of Chancery to the part of this book relating specially to that Court. It may here, however, be observed, that the sheriff is an important ministerial officer of the Court of Chancery as well as of the Courts of Common Law. If a defendant do not, on service of a bill in Chancery, duly appear to it or answer it, he is liable to arrest on a writ of attachment addressed to the sheriff. Obedience to decrees and orders of the Court may also be similarly enforced by attachment. Orders of the Court of Chancery, for the payment of money by any person, may also be executed, as at law, by writs requiring the sheriff to sell his goods, or deliver possession of his land to the person entitled to payment, until the amount is levied out of the rents and profits of them.

CHAPTER IV.

PROCEDURE IN COURTS OF JUSTICE GENERALLY.

THE stages of a cause vary necessarily, according to its nature; but all causes have certain methods in common, the consideration of which will tend to elucidate the English system of administering justice.

In every litigated cause, no matter what may be its nature, there must be, if it proceed regularly, these constituent parts at least:—1. Summons of the defendant. 2. Pleading or statement of the questions litigated. 3. Evidence (where facts have to be proved). 4. Argument of the cause. 5. Judgment. 6. Execution. The first four of these parts will be here considered; the other two have already been partly considered, and we shall have occasion to recur to them in treating separately of the different courts of law(*a*).

1. *Summons of the Defendant.*—The general principle of law is, that no litigation can proceed until the defendant has been personally called upon to make his defence; yet

(*a*) Of the constituent parts of a civil cause in the Roman law, those which have analogies in the English law were,—*Vocatio in jus*, or personal citation of the defendant; *Contestatio litis*, or pleading or joining issue; *Probatio*, proof of facts; *Disceptatio causæ*, the argument of the cause on both sides; Sentence; Execution; Appeal. In criminal causes the parts analogous to those of English law were the same as those just mentioned, except that, instead of the *contestatio litis*, there was in criminal causes a *citatio rei*, equivalent to the English arraignment. (Hallifax, Civil Law, edited by Geldart, ch. 9 and 13.)

there are some cases in which—where a defendant absconds to avoid such summons, or is out of the jurisdiction—a cause is allowed to proceed in his absence.

In the superior courts of common law all actions, with very few exceptions, commence now with a writ of summons, requiring the defendant to appear to the plaintiff's action; and where the Court is satisfied that this writ has come to the knowledge of the defendant, or that he wilfully evades service of it, leave may be given to the plaintiff to proceed as if the service had been effected (*a*). And if the defendant, though served with the writ of summons, refuses to appear, the plaintiff may obtain judgment.

In the Court of Chancery a somewhat similar practice prevails with respect to the summons and appearance of defendants. An ordinary suit commences by a *Bill*, on which is an indorsement requiring the defendant to appear within a limited period. If the Court be satisfied that the defendant has been in this country within the previous two years, and absconds to avoid service, plaintiff may under certain regulations be authorized to proceed to take the Bill *pro confesso*; and a similar course may be adopted where the defendant omits to appear though served (*b*). There are also some other cases in which a suit is allowed to proceed in the absence of parties out of the jurisdiction, as where their interests are sufficiently represented by other parties to the suit.

The principle of the criminal law is very different, for in the criminal courts no trials, with some exceptions, which we shall proceed to consider, can take place except in the presence of the accused person. No trial for felony can be had except in the presence of the prisoner; but a charge of misdemeanour may be tried although the accused be not present, if he has previously pleaded (*c*). Thus, in 1763,

(*a*) 15 & 16 Vict. c. 76, s. 17.

(*b*) Consolidated Chancery Orders, ord. x. rules 4 and 6.

(*c*) By 28 Edw. III. c. 3, "No man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor dis-

two informations were exhibited against the notorious John Wilkes; one for a seditious libel (the 'North Briton,' No. 45), the other for an obscene and impious libel ('Essay on Woman'); after pleading "Not guilty," but some time before the trial, Wilkes withdrew to the Continent. No defence was made for him on the trial, and he was convicted. Thereupon proceedings of outlawry were taken against him. While outlawed, he returned to England, and surrendered to custody, and subsequently received the judgment of the Court, which sentenced him to fine and imprisonment (*a*).

The process of outlawry, by which a man is adjudged to be put out of the protection of the law, is a process which was formerly very often resorted to, both in civil and criminal cases, against an absent defendant, to compel him to appear and contest the cause; and sometimes, as we have seen in the case last cited, has been used in criminal cases after conviction. It is now abolished as a means of compelling an appearance to actions at common law, but is regarded by modern authorities as a process which may still be resorted to, where an indictment for felony or misdemeanour has been found against any absent person, and

inherited, nor put to death, without being brought in answer by due process of law" (*saunz estre mesne en respons par due proces de lei*). (See 3 Blackstone, 424.)

An Act of the Scottish Parliament (11 Act, 2 Parl. Car. II.) authorized the trial of absent persons in cases of treasonable rising in arms, and open and manifest rebellion. But in ordinary criminal cases the verdict can be received only in the presence of the accused, and if he escape at this stage of the trial, no further step can be taken in the trial, but sentence of "fugitation" may be pronounced as if he had never appeared. (2 Hume's Commentaries; Trials for Crimes, 266.) The Gordons of Earlstown, and others, were convicted, in 1680, of high treason in their absence, under the Scotch Act just cited. (11 State Trials, 45.) In the collection and abridgment of celebrated criminal trials in Scotland, by Hugo Arnot, quarto, 1785, p. 79, it is said that only one case occurred after the Revolution of a person tried and convicted in his absence: it is added, "The first instance of this tyrannical mode of proceeding was the illegal sentence upon the rebel Covenanters after the battle of Pentland, which was afterwards rescinded by Act of Parliament. The rebels of Bothwell Bridge met with the same treatment, and the like was repeated after the defeat of Monmouth."

(*a*) Case of John Wilkes, 4 Burrows's Reports, 2527.

summary process is ineffectual for his apprehension. The consequences of outlawry in civil cases were, a forfeiture of goods and profits of lands, and various civil disabilities. In criminal cases, the outlawry amounts to a conviction of the offence charged in the indictment, as if the offender had been found guilty by a jury; and in former times many men accused of capital crimes have been executed upon outlawry(*a*).

Another case in which an accused person may be condemned in his absence is, where he is attainted by a Bill of Attainder in Parliament. We have already seen(*b*) that attainder in Parliament was originally resorted to where, by reason of the flight of the accused persons from justice, they could not be regularly impeached or tried in a court of criminal jurisdiction; but in the time of the Tudors, at-

(*a*) See Wilkes's case, *supra*; 4 Blackstone, 319; Co. Litt. 120 *a*; Archbold, Pleading in Criminal Cases, 71.

Among the atrocious State Trials of the reign of Charles II. there is not one more flagrantly iniquitous than that of Sir Thomas Armstrong, who was executed, upon an outlawry for treason, in 1684. While he was in Holland, whither he had fled to escape proceedings against him on account of the Rye House Plot, he was indicted for treason, and thereupon outlawed. Within a year afterwards, he was captured abroad and brought before the Court of King's Bench in England. He claimed the benefit of a statute (5 & 6 Edw. VI. c. 11), which provides that process of outlawry might be awarded against an offender in treason, being out of the realm, but that the outlaw, if he yielded himself to the Chief Justice of England within a year after the outlawry was pronounced, might be allowed to traverse the indictment and be tried. Chief Justice Jefferies held that Armstrong, being brought before him in custody, had not yielded himself within the meaning of the statute; refused to allow the question of law to be argued by counsel, and brutally sentenced Armstrong to death.

These proceedings were inquired into in 1689, by the House of Commons, and the House resolved that the plea of the statute of Edward VI. ought to have been admitted, and that the attainder by outlawry was "a murther by pretence of justice." (10 State Trials, 105.)

A case which, with respect to the legal principles involved, was somewhat similar to that of Sir Thomas Armstrong, was that of Tandy and Morris, in Ireland, in 1800. They had been arrested abroad within the time limited by an Act of Attainder for their surrender, and it was decided by a jury that the arrest was a sufficient excuse for not surrendering. (27 State Trials, 1191.)

(*b*) *Ante*, p. 231.

tainder was, in opposition to the principles of justice, extended to persons who, though in custody, were condemned in their absence(*a*). After the attainder of the Duke of Somerset, in the reign of Edward VI., an Act was passed requiring that where the accused can be produced, the witnesses, if alive, shall be examined in his presence. In subsequent cases the accused have been allowed to defend themselves by counsel and witnesses before both Houses. But though there have been no attainders in modern times, and they are very repugnant to the principles of the common law, yet it is of course possible that Parliament might, in times of danger, exercise its supreme power by passing Acts of Attainder (or of pains and penalties) against persons accused of high crimes and misdemeanours(*b*).

2. *Pleading.*—It is obviously essential to the satisfactory adjudication of every cause, that the tribunal be, *before* hearing the cause, distinctly informed of the nature of the

(*a*) *Infra*, Book II. Ch. 6.

(*b*) The policy of Bills of Attainder was much discussed in the case of Sir John Fenwick, attainted and executed in 1696. In his case a conviction could not have been obtained in the ordinary courts, because of a defect of the evidence required by the laws of high treason. (See also 4 Hatsell's 'Precedents,' 97.)

The most important Bill of Pains and Penalties in modern times was that for the degradation of Queen Caroline, brought into the House of Lords in 1820. This Bill, intituled, "An Act to deprive her Majesty Caroline Amelia Elizabeth of the title, prerogatives, rights, privileges, and exemptions of Queen Consort of this Realm, and to dissolve the marriage between his Majesty and the said Caroline Amelia Elizabeth," was presented, July 3rd, 1820; read a second time after hearing counsel and evidence, November 4, 1820; and abandoned by a resolution, November 9, 1820. (53 Lords' Journals under the respective dates.)

A very remarkable instance of the virtual condemnation of men unheard was that of John Bernardi and others, who were arrested in the reign of William III. for supposed complicity in the Assassination Plot. These men, who were never subject to any kind of trial, were, by an Act, 8 Will. III., required to be "detained and kept in custody, without bail or mainprise, until the 1st day of January, 1697." Their imprisonment was continued under subsequent Acts of that reign, and of the reigns of Anne, George I., and George II., and Bernardi died in Newgate in 1736, having been a prisoner in that gaol for about *forty years*. (13 State Trials, 759.)

questions to be tried. Otherwise the cause would be confined within no certain limits, and the attention of the Court might be distracted by endless and vague altercations. Accordingly, no rule is more palpably necessary than that adopted in Courts, both of Law and Equity, of strictly confining the parties at the hearing of a cause to the discussion of questions previously put in issue between them by *pleadings*. On one thing, at least, the parties to every contested cause must be agreed, viz. the nature of the issue between them. The methods adopted to bring them to this sort of agreement differ materially in different courts; but, in all, the preliminary proceeding for the purpose is by "pleadings," which may be defined to be statements which, previously to the trial of a cause, are made by the parties themselves, for the purpose of informing the Court of the questions to be tried(*a*).

Some of the analogies and differences between different kinds of pleading in different courts may be here noticed, for they afford an insight into the nature of the courts themselves. In *actions* in the superior courts of common law, the great object of pleading is to bring the parties to distinct and separate issues of fact or of law. It has been already observed that in trial of such actions, pure issues of law are determined by the judges, and issues of fact generally by juries. This distinction between the functions of judge and jury renders it necessary to separate issues of fact from issues of law. Not indeed that in common-law pleadings that separation is absolute and complete, for the rules of pleading allow many issues in fact which involve subordinate legal questions; and therefore, though a *mere* question of law can never go to a jury, they frequently have to determine incidentally to an issue of fact some question of law, as to which they will usually be guided by the directions of the judge(*b*).

(*a*) "Pleading," in common parlance, means forensic argument; but this is not the legal meaning of the word.

(*b*) Stephens on Pleading, 508; and see, as to the functions of judge and jury, *ante*, Book II. Ch. 3.

In the Court of Chancery, in the Civil and Ecclesiastical courts and the Scotch courts, which observe some of the principles of the Roman law, questions of fact and questions of law are, in many cases, alike determined by the judges. In these cases, therefore, the same necessity does not exist as in the English courts of common law for separating the two kinds of issues. The pleadings are *at large*, that is, the issues of fact and law are mixed together. Since trial by jury in civil cases has been engrafted in the manner already mentioned(*a*) upon the judicial system of Scotland, it has of course been found necessary to settle between the parties the questions to be tried by jury; but such questions are elicited, not by the mere effect and operation of the pleading itself, but by a distinct act of the Court(*b*). So where, by direction of the English Court of Chancery, an issue is to be tried by jury, the terms of the issue are settled by the Court, with the assistance of the parties.

In the superior courts of law in England, the manner of pleading in actions is by a process of statement and counter-statement, by which the dispute, by successive admissions, becomes narrower at every stage of the pleadings, till at last it is reduced to separate and direct issues between the parties. The pleadings commence with the plaintiff's *declaration*, which states his cause of action and claim. The nature of the defendant's answer differs according to his determination at this stage to rely on an issue of law merely, or an issue of fact. In the former case he puts in a *demurrer*, which assumes the facts stated by the plaintiff to be true, but objects that they are not sufficient, or not properly stated, to entitle the plaintiff-in-law to the relief he claims. In the latter case, instead of demurring, the defendant opposes the declaration by matter of *fact* alleged by a *plea*. The facts so alleged may either raise formal objec-

(*a*) *Ante*, p. 350.

(*b*) Stephens on Pleading, 499. The materials from which the Court adjusts the issue are "condescendencies" and answers," which are allegations of a more specific and succinct kind than the pleadings. (*Ibid.*)

tions—for instance, to the jurisdiction of the Court—or substantial objections impugning the right of action altogether. Wherever the plea does not amount to a total contradiction ("traverse") of the plaintiff's declaration, the plaintiff may reply by his *replication*. Again, wherever this does not amount to a total contradiction of the defendant's plea, he may *rejoin*; and so on alternately. But the alternations are few in practice, for every plea is required to be simple and distinct, and the rules of pleading are contrived so that the matters in dispute may be reduced speedily to direct contradictions between the parties; whereupon the cause is said to be brought to an *issue*(*a*), and is in a fit state to be tried. An issue (*exitus*), being an end of all the pleadings, is (as we have said) upon matters of fact or matters of law.

It may be added to this brief account of pleading at law that either party is liable to be met by a demurrer at any stage of the pleadings, on the ground that his last pleading does not set forth sufficient ground of action, defence, or reply, as the case may be(*b*).

This method of pleading, by which the issues to be tried are elicited or eliminated by the parties of themselves, seems peculiar to the English Common Law. In Chancery there is no such process. There the usual course of pleading in ordinary suits is by *Bill* and *Answer*. The Bill of Complaint, which is in the form of a petition to the Lord Chancellor, states the plaintiff's case, and prays the relief to which he considers himself thereupon entitled. The *Answer* admits, denies, or explains the various statements of the bill, and con-

(*a*) The phrase "issue" occurs at the very commencement of the year-books, viz. 1 Edw. II. The terms *issue en ley* and *issue en fet* (issue in law and issue in fact) occur in 3 Edw. II. Issue is thus defined in the year-book, 21 Edw. IV.:—"*Exitus* idem est quod finis sive determinatio placiti." (Stephens on Pleading, xvi.)

The brief account of pleading at law given in the text, is, of course, a mere outline of a very abstruse and exact science. The work just cited is considered to be one of the most philosophical treatises on pleading.

(*b*) 15 & 16 Vict. c. 76, s. 50.

tains the statements which the defendant makes in his defence. An Answer is partly of the nature of pleading, and partly of the nature of evidence; for usually it is put in upon oath, and contains the defendant's answer to *interrogatories*, which the plaintiff has previously filed for the discovery of circumstances which, by the rules of equity, the defendant is bound to disclose.

To this Answer the plaintiff may file *replication*, which is a general contradiction to the Answer. This contradiction imitates in some measure the form of an issue at common law and borrows its name, yet in substantive effect the two results are very different; for the contradiction to which the name of an *issue* is given in equity pleading is general and indefinite, and upon the hearing of the cause, the judge determines by the comparison of all the pleadings what are the questions at issue.

Something resembling the alternations of common law pleading exists however in the practice of the Court of Chancery, which allows the plaintiff to *amend* his bill in consequence of information derived from the Answer, and then allows the defendant to make a further Answer to such amendments. Such process of amending the bill and further answering may be continued several times.

There is also an analogy in equity pleadings to the common law process of *demurring*. If the defendant considers that the bill, assuming all its statements to be true, does not raise a case which entitles the plaintiff to the relief or discovery which he seeks, that objection may be raised by a *demurrer* to the whole or part of the bill. So also the defendant may, after answer to the original bill, demur to the additions made to it by amendment(*a*).

The analogy of equity pleadings to those of common

(*a*) The same observation applies to this account of equity pleadings as to the former account of common-law pleadings, namely, that the account is merely an outline. It is not intended as an exposition of the mysteries of pleading, except so far as the subject is one of general interest. The most esteemed treatise on Equity pleading is that of Mitford, afterwards Lord Redesdale.

law was closer in ancient times than it is now. Before the practice of allowing the plaintiff to amend his bill was established, it became frequently necessary to meet the answer, not as now by a general replication, but by special replications, which led to rejoinders and surrejoinders, closely resembling common law pleadings(*a*). The practice of allowing amendments of pleadings has a great tendency to relax their strictness, and as the practice has been lately much extended in common law courts, will probably tend to assimilate the pleadings of those courts in some respects to those of the Court of Chancery.

In the part of the common law which relates to *crimes and misdemeanours*, the pleadings in several respects resemble those of actions at law. In criminal proceedings (except for minor offences which may be punished summarily), the pleadings usually(*b*) commence with an *indictment*, or written accusation of some crime or misdemeanour. Upon this indictment the accused person is *arraigned*, that is, called upon to answer the indictment; and thereupon he may, as in civil cases, either plead or demur. He may demur to the indictment on the ground that the fact as stated does not amount to any crime in law; or he may plead specially, as that the Court has not jurisdiction, or a former acquittal, or the like; or, as is most generally the case,

(*a*) Several of the terms of common law pleading are borrowed in Chancery pleading. Two, "demurrer" and "replication," are noticed in the text. "Plea" is another such term, but has a peculiar signification in Chancery. Where the defendant thinks that by stating some fact or facts *not* in the bill he can reduce the controversy, or any part of the controversy, between him and the plaintiff to a *single issue* of fact, he may, in Chancery, defend himself by a *plea;* and if the plea be allowed, he will not be required to answer the bill, or that part of it which the plea covers. Mitford on Pleading, 18. Many other analogies existed between equity and common-law pleadings. Thus, in both, the term "departure" denoted the violation of a rule common to both, that the plaintiff, by his replication, could plead no new matter, except to avoid matter set forth in the defendant's answer; also, replications were liable to demurrers in equity as at common law. (See Beames's 'Orders in Chancery,' p. 29, and note.)

(*b*) The exceptions—proceedings by "information," or upon a coroner's inquisition—will be noticed hereafter.

he may plead guilty or not guilty. If when arraigned he makes no answer, the Court may order the proper officer to enter a plea of not guilty(*a*).

It is supposed that the system of written pleadings in the common law courts originated about the middle of the reign of Edward III., and that previously the pleadings were *oral*. That the pleadings were oral in the time of Henry II. appears from passages in Glanville, in one of which the litigants are described as appearing personally in court, the claimant preferring his claim orally, and the tenant being required thereupon to elect as to the mode of defence(*b*). And Bracton similarly shows that oral pleading prevailed in the reign of Henry III.(*c*). It is conjectured that this was gradually superseded by the pleaders on either side, instead of making alternate statements in court, entering their statements alternately on the parchment roll on which the record was to be drawn up; and that subsequently the practice was introduced of delivering the pleadings in writing to an officer of the court to be entered at a later stage of the cause(*d*).

The separate equitable jurisdiction of the Court of Chancery was not, as we have seen, established earlier than the reign of Edward III., when written pleadings came into use

(*a*) If the judgment on demurrer to an indictment be for the defendant, he is discharged; if against him, in a case of misdemeanour, the consequence is the same as on a demurrer in civil cases, and the Court has the same power of permitting the defendant to plead over. Demurrers to indictments for felonies have hitherto been so rare, that it has been doubted what judgment ought to be pronounced against the defendant. It was sometimes considered that *in favorem vitæ* the defendant should be allowed to plead over, but it is now settled that on a *general* demurrer the judgment for the Crown is final; though it may be otherwise in case of a special demurrer in abatement. (Archbold, Pleading in Criminal Cases, 116.)

(*b*) Utro litigantium apparente in curia, petens ipse loquelam suam et clameum ostendat in hunc modum: "Peto versus istum H.," etc. Auditâ vero loquelâ et clameo petentis, in electione tenentis erit se versus petentem defendere per duellum, etc. (Glanville, cited Stephens on Pleading, p. ix.)

(*c*) *E.g.* Audito brevi de recto, dicat sic petens vel ejus advocatus in præsentiam justitiariorum pro tribunali residentium, "Hoc ostendit vobis A.," etc. (Bracton, cited Stephens on Pleading, p. ix.)

(*d*) Stephens on Pleading, 36. 2 Reeves's Hist. of Eng. Law, 267.

in the common law courts. It seems probable that after that time at least equity pleadings were regularly in writing; the earlier jurisdiction of the Chancellor may have been sometimes exercised summarily without written pleadings(*a*).

In the ancient county courts and other courts of local jurisdiction which were not *courts of record*, the proceedings were not recorded as solemnly as in the courts of record, and the system of written pleadings was unknown. In the county courts the plaintiff commenced his suit, not by writ, but by a less formal *plaint*(*b*), briefly stating his grievances. The same course is adopted in the modern county courts, in which the pleading is almost entirely oral. The plaint by which the suit commences is in writing, but the defence is not required to be stated in writing except in a few cases.

In appeals to the House of Lords and the Judicial Committee of the Privy Council, the parties present *printed cases*, which are of the nature of pleadings, and are described in the subsequent chapters of this book, which relate to the judicature of Parliament and the Privy Council. In the former of these chapters we shall describe the pleadings on impeachments, and show their analogies to common law pleadings.

3. *Evidence.*—It has been already stated that all issues of fact, whether tried by judge or jury, are determined by evidence as to the admission or rejection of which the law imposes very strict rules. These rules are very nearly the same in the courts of common law, both in civil and criminal cases, in the Court of Chancery, and in courts of inferior jurisdiction; they are very strictly acted upon where issues of fact are determined by the House of Lords in its judicial capacity; they are also regarded by Parliamentary Committees on private bills, though not always

(*a*) 1 Spence, Equitable Jurisdiction, part 2, book i. ch. 6, book iv. ch. 1
(*b*) 3 Blackstone, 273.

strictly, because the members of the committees are not usually well versed in the rules of evidence.

These rules it is not within the scope of this work to examine generally; but one or two observations are required with respect to some of them which favour the liberty of the subject. In the first place, it is to be observed that the burden of proof is generally upon the party who maintains the *affirmative* of any issue of fact. A necessary consequence of this rule in criminal prosecutions is stated in the maxim, that the law presumes every man to be innocent till he be proved guilty. Strict adherence to the rules of evidence is most important, and is usually most vigilantly demanded in criminal cases; and the law so imperatively demands proof of guilt, that it holds, says Sir William Blackstone, "that it is better that ten guilty persons escape than that one innocent suffer"(*a*). This proposition has been contested by Archdeacon Paley. "If by better," he says(*b*), "be meant that it is more for the public advantage, the proposition, I think, cannot be maintained. The security of civil life, which is essential to the value and enjoyment of every blessing it contains, and the interruption of which is followed by universal misery and confusion, is protected chiefly by the dread of punishment." Sir Samuel Romilly well replies to this objection, that it is true that the security of civil life is protected chiefly by the dread of punishment, but that is "of punishment as a consequence of guilt, not of punishment falling indiscriminately on those who have not, and on those who have, provoked it by their crimes. . . . It should be recollected too that the object of penal laws is the protection and security of the innocent; that the punishment of the guilty is resorted to only as the means of attaining that object. When therefore the guilty escape, the law has merely failed of its intended effect; it has done no good indeed, but it has done no harm. But when the innocent become the victims of

(*a*) 4 Blackstone, 359.
(*b*) Principles of Moral Philosophy, book 6, ch. 9.

the law, the law is not merely inefficient, it does not merely fail of accomplishing its intended object; it injures the persons it was meant to protect, it creates the very evil it was to cure, and destroys the security it was made to preserve"(*a*). These observations have a terrible significance when it is remembered that they were made at a time (A.D. 1810) when wholesale hanging was commonly resorted to, and regarded by persons in authority as the best preventive of crime.

Another important principle of evidence here to be noticed is that every party to any cause whatever may freely produce witnesses, and cross-examine all his opponent's witnesses if they be alive, and can be produced. In some cases, indeed, the rule requiring the witnesses to be produced at the trial of a cause for cross-examination, is partially relaxed. For instance, in criminal cases the preliminary depositions of a witness are sometimes allowed to be produced upon a trial after his decease, or when he is absent by the procurement of the prisoner, or illness(*b*). The proper objects of cross-examination are either, where the witness has told part only of the truth, to elicit in favour of the cross-examining party evidence supplying omissions, or explaining ambiguities in his former evidence; or where he has not spoken the truth, to discover the untruth by questions testing his statements in various ways; or lastly, by eliciting from him circumstances respecting his own character or interests which affect his credibility as a witness. Great latitude is allowed in cross-examination, but the questions must either be pertinent to the issue, or calculated to elicit the witness's title to credit. It is in cross-examination of the latter kind that the privilege of cross-examining is most likely to be abused, and it is part of the duty of the judge to protect a witness improperly cross-examined. He is not bound to answer any question the

(*a*) Observations on the Criminal Law, by Sir Samuel Romilly, reprinted in the "Speeches of Sir S. Romilly in the House of Commons," vol. i. p. 162, note.

(*b*) See 11 & 12 Vict. c. 42, s. 17.

answer to which may tend to subject him to punishment or penalties; and if on cross-examination he denies the commission of a crime imputed to him in order to affect his credibility, the cross-examining party cannot produce any other evidence that he committed the crime than the record of his conviction(*a*).

The licence of cross-examination formerly (and even now in a less degree) permitted, has been frequently the subject of animadversion. Thus Burnet, referring to the Scotch system, observes, "Nor do we allow the latitude, it may be termed licence, to counsel in the cross-examination which is permitted in England, of going frequently out of the cause, and putting what questions they please to a witness, in order to try his *credit*, or, as may be said in many cases, his *temper*; by which a plain and honest witness may be often confounded, and an irritable one led into indiscretions, as unbecoming to the Court as injurious to the cause of truth and justice. Fair and honest witnesses—those who, to use the language of the Imperial Rescript, *simpliciter visi sint dicere, qui non unum eundemque meditatum sermonem attulerint, sed ad ea quæ interrogaveras, ex tempore verisimilia responderint*—are entitled to the fullest protection of the law, and ought not, by the ingenuity of a pleader, to be led into perplexities and seeming contradictions"(*b*).

(*a*) Archbold's Pleading in Criminal Cases, 251.

(*b*) Burnet, Criminal Law of Scotland, chap. 18, p. 466, quarto ed. 1811.

If the licence here spoken of be discreditable when practised at the bar, how much worse is it when it proceeds from the bench! Of the latter abuse the following is an example, which illustrates the state of the judicature in the reign of James II.:—

On the trial of Lady Alice Lisle for high treason, in 1685, one of the witnesses (Dunne) underwent a long and terrible examination from Lord Chief Justice Jefferies, in which he repeatedly denounced the wrath of God against him, and abused him with a multitude of appellations, such as "lying Presbyterian knave," "villain," "impudent rascal," and the like. "My lord," said the bewildered man, after one of these torrents of invectives, "pray ask the question over again once more, and I will tell you." Jefferies did so, after another long harangue about the danger of perdition of the witness's soul. Dunne's answer dissatisfying him, he broke out,—

It was an ancient practice, derived from the civil law, that a prisoner accused of a capital crime should not be allowed to exculpate himself by the testimony of witnesses. Sir Edward Coke protested strongly against this practice as not warranted by law, and it was gradually relaxed. At length, by a statute of William III., witnesses for the prisoner were allowed in certain cases of treason; and finally, by a statute of Anne, it was provided that in all cases of treason and felony all witnesses for the prisoner should be examined on oath, in like manner as the witnesses against him (*a*).

Confessions and admissions, to be admissible at the trial of a person accused of any crime, must have been made freely and voluntarily by him; they will not be received if induced by any promise of favour or menaces on the part of the prosecutor, or by the like inducement of any person in authority. At the end of the preliminary examination of an accused person before a magistrate, he must ask the accused whether he wishes to say anything in answer to the charge, and inform him that he is not obliged to make any answer; but that if any be made, it may be used against him at his trial. The law is more strict as to receiving admissions in criminal than in civil causes, for in the former,

"Why, dost thou think that, after all this pains that I have been at to get an answer to my question, thou canst banter me with such sham stuff as this? *Hold the candle to his face, that we may see his brazen face.*" ... *Dunne:* "My lord, I am so baulked I do not know what I say myself. Tell me what you would have me to say, for I am cluttered out of my senses." ... A little further on is an amusing instance of the witness's bewilderment and Jefferies's fury. Jefferies accused the witness of complicity with rebels. *L. C. J.:* "It seems you told Barter that you apprehended them to be rebels." *Dunne:* "I apprehend them for rebels, my lord?" *L. C. J.:* "No! no! you did not apprehend them for rebels, but you hid them for rebels. But did you say to Barter that you took them to be rebels?" *Dunne:* "I take them for rebels?" *L. C. J.:* "You blockhead! I ask you, did you tell him so?" *Dunne:* "I tell Barter so?" *L. C. J.:* "Ay, is not that a plain question?" *Dunne:* "I am quite cluttered out of my senses. I do not know what I say:"—*a candle being held still nearer his nose.* (11 State Trials, 297.)

(*a*) 4 Blackstone, 359.

admissions entered into by the attorneys on both sides will not be received unless made by the defendant or his counsel at the trial(*a*).

By recent important alterations in the law of evidence, no witness is excluded by incapacity from crime or interest from giving evidence in any action, civil or criminal (*b*); in any proceeding in any court of justice, the parties thereto, or persons interested in it, are competent and compellable to give evidence; but this does not extend to a person charged with any offence, nor is any one compellable to answer any question tending to criminate him(*c*). Husbands and wives of parties to any proceedings are compellable to give evidence for either party, but are not compellable to disclose any communication between them during marriage; nor are they competent witnesses against each other in criminal proceedings(*d*).

In ecclesiastical causes, formerly the judge might compel the parties to answer upon oath to any matter objected against them, however criminal(*e*); but by 13 Car. II. c. 12, s. 4, no ecclesiastical judge may tender any oath whereby to compel any person to accuse or purge himself of any criminal matter liable to censure or punishment. In the Star Chamber, persons sued there were required to answer upon oath, and might be examined on interrogatories. This practice of examining accused persons was one of the principal causes of the popular odium of that court, which led to its downfall. The practice of examining defendants to suits in Chancery upon interrogatories pertinent to the subject of the suit is of ancient date(*f*), and is continued

(*a*) 11 & 12 Vict. c. 42, s. 18. Archbold, Pleading in Criminal Cases, 193–9.

(*b*) 6 & 7 Vict. c. 85. (*c*) 14 & 15 Vict. c. 99.

(*d*) 16 & 17 Vict. c. 83.

(*e*) Hallifax on Civil Law, by Geldart, 157; and see, as to the *ex officio* oath, 12 Coke's Reports, 26, 27, where it is said that the examination of a criminal on oath was *inventio Diaboli ad destruendas miserorum animas ad infernum.*

(*f*) John de Waltham, Master of the Rolls to Richard II., devised the writ of subpœna returnable in Chancery to make trustees accountable. By

to the present time. The defendant also, after putting in a sufficient answer, may file interrogatories for the examination of the plaintiff (15 & 16 Vict. c. 86. s. 19). In the superior courts of common law, by a recent change in the practice, either party to a cause has a right, at an early stage of it, to obtain discovery of documents in his opponent's possession relating to the matters in dispute, and to file interrogatories for his examination on all matters the discovery of which is material to the cause(*a*).

4. *Argument of the cause.*—The arguments urged at the hearing of a cause by the advocates on both sides are termed by the civil lawyers "informations." The office and duties of counsel, and the right of parties to all causes to appear by counsel, have been considered in the previous chapter. It only remains to be added, that parties are entitled to conduct their own causes in person if they please(*b*).

In addresses to juries in trials of issues of fact, the right to begin and the right to reply are naturally regarded as of no little importance. In civil causes, the party on whom

this writ pleas were determinable by examination and oath of the parties, according to the form of the law civil and the law of holy Church. (3 Blackstone, 52.)

About the time of Henry V. the Court of Chancery became of frequent resort for the purpose of compelling an admission of trust by the oath of the defendant. (Kennedy's Code of Chancery Practice, 10.)

(*a*) Com. Law Proc. Act, 1854, ss. 50–52.

(*b*) But in the House of Lords and Judicial Committee of the Privy Council, appeals and printed cases must be signed by counsel (Macqueen, 133, 711); and in Chancery, pleadings must be signed by counsel. (Consolidated Order of Chancery, viii. rule 1.) The same rule prevailed formerly in the common law courts, but in them now the signature of counsel is not required to any pleading. (15 & 16 Vict. c, 76, s. 85.)

All these tribunals will admit a party, upon the requisite proof of his poverty, to sue or defend himself *in formâ pauperis*, and have counsel and solicitor or attorney assigned to him gratuitously. This provision is enacted with respect to suits in Courts of Record, by Hen. VII. c. 12. (See, as to suing *in formâ pauperis* before the House of Lords, Macqueen, 259; in Chancery, Consolidated Order, vii. rules 8–10; at common law, Rules of Practice, 1853, rules 121–2; in criminal cases, Archbold's Pleading in Criminal Cases, 130.)

the burden of making out the affirmative lies, begins by addressing the jury; and then he adduces his evidence. His right to reply to his opponent's case depends on whether the latter does not or does adduce evidence. If he do not, the first party sums up his evidence at its conclusion, and has no further right of addressing the jury; the opponent makes his address, and there the argument ends. But the opponent, if after his address he adduce evidence, may at its conclusion sum it up; and then the first party has a right of replying finally(*a*). In criminal causes a private prosecutor has no right to reply unless the defendant call witnesses; but on a trial upon information *ex officio* by the Attorney-General, he has a right of reply even though the defendant call no witnesses(*b*).

(*a*) Common Law Commissioners' Second Report, 1853, p. 9; Com. Law Proc. Act, 1854, s. 18.

(*b*) Archbold, Pleading, 96.

CHAPTER V.

THE SUPREME POWER OF THE LAW.

THE object of this chapter is to give a general statement of the extent to which, and the means by which, every class of persons in England is subject to the laws. The supreme power of the law is in our constitution more effectually secured than in any other with which we are acquainted; but though this security is constantly assumed to exist, the nature of it can be understood only by particular examination of the jurisdiction of the courts of justice over the different parts of the community.

A complete investigation of this important subject would require an extensive survey of many critical questions of law which have been the occasions of almost interminable controversy. In order to narrow the inquiry, the attention will be confined to the principal points in which the law has distinctly asserted its own supremacy. We shall, in the *first* place, consider the legal responsibility and immunities of various persons and classes—i. of the Crown; ii. of ambassadors; iii. of ministerial and judicial officers; iv. temporary immunities. In the *second* place, we shall refer to some of the more important particulars in the history of State imprisonments and prosecutions. In the *third* place we shall consider the *methods* by which the supremacy of the law is secured, and under this head shall treat of—i. the means which the law gives to prevent illegal imprisonment or punishment; ii. the means adopted to compel the tribunals

to discharge their duties; iii. the means of enforcing the law against powerful persons.

1. We have to consider in the first place various kinds of LEGAL IMMUNITIES, and herein

i. *The Legal Immunity of the Crown.*—The first, and in some respects the most difficult, question is, how far is the Crown itself subject to the laws? It was said so long ago as the time of Bracton(*a*): *Ipse autem Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit Regem:* the King ought not to be under any man, but under God and under the law, because the law maketh the King. But is this superiority of the judicature compulsory, or permissive only? As far as the ordinary courts of law are concerned, it seems manifest that their authority to execute justice against the Crown is only permissive.

The distance between the sovereign and his subjects is such, says Blackstone, that it can rarely happen that any personal injury can immediately and directly proceed from the prince to any private man; and as it can so seldom happen, the law in decency supposes that it never will or can happen at all, because it feels itself incapable of furnishing any adequate remedy without infringing the dignity and destroying the sovereignty of the royal person by setting up some superior power with authority to call him to account. The inconveniency therefore of a mischief that is barely possible, is (as Mr. Locke observed) well recompensed by the peace of the public, and security of the government in the person of the chief magistrate being set out of the reach of coercion(*b*).

The principle that "the King can do no wrong," though regarded by Blackstone in the same place as a necessary and fundamental principle of the English constitution, can hardly be considered to have been established until long after the constitution had assumed nearly its present form.

(*a*) Bracton, De Legibus, lib. i. cap. 8, fol. 5. (*b*) 3 Blackstone, 255.

The Norman Barons, in accordance, as will be presently shown, with the polity of the feudal law, regarded their allegiance as a mere question of compact between themselves and the Crown, and in several cases directly withdrew that allegiance, or procured new terms of that allegiance by purchase or coercion. For example, the Magna Charta of Henry III. expressly states (c. 37), "for this, our gift and grant of these liberties, and of others contained in our charter of liberties of our forest, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders, and others our subjects have given unto us the fifteenth part of all their moveables; and we have granted unto them for us and our heirs, that neither we nor our heirs shall procure or do anything whereby the liberties in this charta contained shall be infringed or broken."

On other occasions, as we have seen in the cases of Henry III., Edward II., and Richard II., the barons virtually deprived the Crown of a large part of its power, and compelled the sovereign to accept their nominees as an administrative council. At another time, as in 17 Hen. III., A.D. 1233, the barons tell the King that if he do not accede to their terms they will elect another in his place(*a*).

In 1327, when Edward II. was in the custody of the Earl of Lancaster, it was agreed in Parliament that the King should be deposed, and his son Edward III., then a youth fourteen years of age, should be admitted to be King in his stead. Walsingham says(*b*) that all the nobility met at London on the morrow of the feast of the Epiphany in Parliament, and judged the King unfit to rule, and for several reasons to be deposed. Richard II. was similarly deposed in Parliament in 1339. In each of these cases the same ceremonials were observed. A renunciation was procured from the King; articles of accusation were formally

(*a*) *Ante*, Book I. Ch. X.

(*b*) Walsingham, Historia Angl. in "Anglica, Normanica, Hibernica, Cambrica, a veteribus scripta," edit. Gulielmi Camdeni, p. 126.

Walsingham states that on the flight of Edw. II. previously to the proceedings here referred to, his son had, by a decree of the nobility, been appointed *Custos Regni*. (*Ib.* p. 125.)

exhibited against him in Parliament; a judgment was given on these articles by the Lords; several prelates and others, appointed by the Lords and Commons commissioners for the purpose, publicly pronounced sentence of deposition in Parliament; the homage and fealty of all the estates of the realm were immediately afterwards resigned and re-delivered to the King personally by procurators for the whole Parliament; and then, the throne being declared vacant, the title of the new King was recognized by Parliament(*a*). Immediately after the accession of Richard's successor, Henry IV., he assembled a new Parliament. Rapin says that in this Parliament the Commons, not satisfied with the bare deposing of Richard after a very irregular manner, would have had him tried in form, and petitioned the King (Henry IV.) for that purpose(*b*). Rapin adds in a note, that according to Hollingshead, the Commons' address was to this purpose,—that since King Richard had resigned, and was lawfully deposed from his royal dignity, he might have judgment decreed against him. It is remarkable also with respect to the deposition of Richard II., that the doctrine was then openly advanced by a single dissentient in Parliament, the Bishop of Carlisle, that there was no authority which could lawfully depose a King of England(*c*).

The doctrine of personal responsibility of the Sovereign is thus set forth in a very curious document recited in the Statute of Exile of the Le Despencers, 13 Edw. II., A.D. 1320. Le Despencer and several lords who had been at the Parliament at York appointed advisers of the Crown, entered into a bill or agreement that "homage and the oath of allegiance is more by the reason of the Crown than of the person of the King, and bound more to the Crown than the person; and this appeared for that before the Crown descends there is no allegiance due to the person expectant. Wherefore in case the King carries not himself by reason

(*a*) Rotuli Parliamentorum, vol. iii. p. 416; 1 State Trials, 47, 131.
(*b*) Rapin's Hist. of Eng., vol. i. book 11, p. 486. (*c*) *Ibid.*

in right of the Crown, his lieges are bound by oath made to the Crown to remove the King and the state of the Crown by reason; and otherwise the oath ought not to be kept. Then it was demanded whether the King was to be dealt with by suit of law or by rigour (*mener le Roi ou per sute de lei ou per asperte*). By suit of law it could not be, for he had no judge. In which case, if the King's will be not according to reason, and that he maintains nothing but error, therefore to save their oath, and when the King will not redress what is injurious to the people, they must proceed with rigour, for he is bound by oath to govern his lieges, and his lieges are bound to govern in aid of him and in default of him"(*a*).

The doctrine thus advanced seems perfectly consistent with the feudal law which then prevailed in Europe. In the celebrated *ordonnances* of St. Louis, a general judicial code enacted by Louis IX. of France, in the thirteenth century, it is expressly laid down that if a lord require his liege tenant to join him in making war against the sovereign who has refused him justice, the liegeman shall go to the King and inquire if he so refuses justice. "And thereupon, if the King answers that he will do no judgment in his court, the man shall return immediately to his lord, and his lord shall equip him and fit him out at his own expense; and if he will not go with him, he shall lose his fief by right(*b*)."

(*a*) Exilium Hugonis le Spencer, Ed. II.; authentic edition of the Statutes, vol. i. p. 182.

Coke says, in Calvin's case (7 Rep. 12), that this doctrine of Le Despencer was condemned by two Parliaments—one in the reign of Edward II., called 'Exilium Hugonis le Spencer,' and the other in anno 1 Edw. III. c. 1; but on reference to those Acts of Parliament it will be found that the condemnation of the De Spencers proceeded mainly on the ground that they excluded other great men from the King's councils, and contravened an agreement previously made in Parliament, "That certain prelates and other great men should be with the King by turns, at several seasons of the year, the better to advise him, without whom no great business ought to pass." Moreover, the condemnation of the De Spencers is deprived of its weight as a precedent by its subsequent reversal. (See *ante*, p. 227.)

(*b*) Quoted in Butler's note to Co. Litt. 191 *a*.

There is an account of the *ordonnances* or establishments of St. Louis,

The Statute of Præmunire, 16 Rich. II. c. 5, declares that the crown of England hath been so free at all times that it hath been in no earthly subjection, but immediately subject to God in all things; but by reference to the immediate context it is apparent that the earthly subjection here disavowed is subjection to the Pope, and that the relations between the King and his subjects are not touched by the statute. There is not, it is apprehended, any statute until long subsequently which recognizes an absolute supremacy of the Crown. The nobles, by their contests with the kings of the Norman and succeeding dynasty, plainly showed that they recognized no such right; the Church during the same period more or less distinctly showed it by recognizing a superior authority of the Pope. Even so late as the reign of Henry VII. we find a statute which is virtually subversive of the doctrine that the King has by inheritance an indefeasible right to allegiance of his subjects. The statute 11 Henry VII. c. 1, which is said by Blackstone to be declaratory of the common law, pronounces all subjects excused from any penalty or forfeiture who assist and obey a king *de facto*, even though he be a usurper. The statute declares the duty of allegiance of subjects to be "to serve their prince and sovereign lord *for the time being* in his wars;" and that they ought not, if the fortune of war turn against him, to be afterwards punished for serving him (*a*). Apparently the first statute in which a divine right by inheritance to the Crown is declared, is the Act 25 Hen. VIII., c. 22, which declares that "the Bishop of Rome and the See Apostolic, contrary to the great and inviolable grants of jurisdiction given by God immediately to emperors, kings, and princes in succession to their heirs, hath presumed in times past to invest those who should please them to inherit other men's kingdoms and domi-

1 Hallam's 'Middle Ages,' chap. 2, part ii.; and a notice of his life, *ibid.* chap. 1, part i.

(*a*) The effect of this Act is discussed in a note to the trial of Sir Harry Vane, in 1662. (6 State Trials, 121.)

nions." The statute was followed in the next year by that which declared the King to be supreme head of the Church.

Upon the trial of Charles I. before the High Court of Justice in 1649, Lord President Bradshaw in his judgment relied on the proceedings of the Norman Barons in England, and examples from the history of Greece, Rome, and Arragon as authorities showing that a King may be lawfully called to account by his people. The counsel for the prosecution, Cook, admitted that a King cannot by the law of England be punished for murder, or any other felony, and that there is no written law to make it treason for a King to destroy his people; but argued that no such law exists, because "our ancestors did never imagine that any King of England would have been so desperately mad as to levy a war against the Parliament and people;" and added, "that when our law-books are silent, we must repair to the law of nature and reason" (*a*).

Many of the "regicides" who took part in this trial of Charles I. were tried for treason in 1660. In the latter trial the presiding judge, Lord Chief Baron Bridgman, strongly upheld the doctrine that the King can do no wrong, and is subject to no coercive power. This doctrine he endeavoured to trace from very remote times, but the only statutes which he relied upon before the time of Henry VIII. were those already cited, referring to the exile of the Despencers, and the Statute of Præmunire in the time of Richard II. These statutes Bridgman cited disingenuously, or at least erroneously. The statutes respecting the Despencers condemn them, not so much for their doctrines respecting the kingly office, as for their assuming too much power as counsellors of the King, and ill-advising the King. Moreover, their condemnation was subsequently annulled by Parliament (*b*). Also, the statute of Præmunire is, for the reason above-mentioned, no authority for Bridgman's proposition. It is observable that he

(*a*) 4 State Trials, 1008, 1033. (*b*) *Ante*, p. 227.

enunciates it guardedly, saying, "I speak only as to the person of the King. I do not meddle of rights between the King and subjects, or subject and subject. . . . The King of England was anointed with oil at his coronation, which was to show that absolute power (I do not say of government) but of being accountable to God only for what he did. The law saith the King doth no injury to any man; not but that the King may have the imbecilities and infirmities of other men, but the King in his single person can do wrong. But if the King command a man to beat me, or to disseize me of my land, I have my remedy against the man, though not against the King. The law in all cases preserves the person of the King to be untouched; but what is done by his ministers unlawfully, there is a remedy against his ministers for it"(*a*).

In the Convention Parliament of 1688, after the Prince of Orange had been petitioned by the Peers to assume the government, the Commons proposed to declare that James II. had "abdicated the government, and that the throne is thereby vacant." The Lords proposed to substitute for the word "abdicated" the word "deserted," because "the word *abdication* is a word unknown to the common law, and of doubtful interpretation; and because it implies a voluntary express act of renunciation, which is not in this case." Finally, however, the Lords agreed to the vote of the Commons without alteration(*b*). The doctrine of unlimited non-resistance was implicitly renounced by Parliament and the nation in the revolution of 1688. The Bill of Rights declared that James II. had abdicated the government, and that the throne was thereby vacant; and that it had pleased Almighty God to make the Prince of Orange the glorious instrument of delivering the kingdom from Popery and arbitrary power. Another Act of the same session recites

(*a*) 5 State Trials, 1227.

(*b*) A note (p. 519) to the edition of Burnet's Hist. of his own Times, London, 1850, gives an account, extracted from the Harleian manuscripts, of the conferences between the two Houses.

that various persons in office, civil and military, had in aid of William, at the time of the Revolution, seized disaffected persons, and done other specified acts not warrantable in ordinary times, and indemnifies them from the consequences of those acts. The principles of non-resistance and passive obedience to the Crown underwent most elaborate consideration upon the impeachment of Dr. Sacheverell in 1710, and the House of Lords condemned those principles by their judgment against him, and condemnation of his sermons in which they were advocated (*a*).

The Regency Bill of 1811, passed during the insanity of George III., though that Act did not affect the question of the responsibility of the Sovereign, affects the question of the supreme power of the Crown to this extent—that the Regency Bill shows that, in cases of absolute necessity, Parliament, without the consent of the reigning Sovereign, will delegate his power to another. By that Act, which received the Royal assent by commission at a time when the King was mentally incapable of authorizing the commission, the Prince of Wales was appointed Regent, with authority to exercise the Royal power and prerogatives in the name of the King, until he should be capable of resuming the personal exercise of the Royal authority (*b*).

The preceding authorities and precedents clearly show that the Sovereign is not subject to any compulsory process of the ordinary courts of justice,—that in feudal times (in the cases of Edward II. and Richard II.) the Lords spiritual and temporal have assumed a right to pronounce judgment against the King, and, in the name of the whole Parliament, to resign and redeliver to him their homage;—that (in the case of Charles I.) the House of Commons has erected a tribunal for judging the King;—that (in the case of James II.) the Lords have initiated, and the whole Parliament concurred in, the appointment of a successor to the King upon his abdication;—and, lastly (in the case of George III.), the

(*a*) 15 State Trials, 1. (*b*) 51 Geo. III. c. 1.

Parliament has, upon the mental incapacity of the King, delegated his power to a Regent.

It is worthy of observation that the maxim that "the King can do no wrong" was understood originally in a sense different from that now applied to it. The ancient meaning of the maxim manifestly was, that the King was not capable of committing any injury which could be redressed by the ordinary process of the courts of law. In modern times, the maxim has been adopted in a more extended and more important sense—namely, that the King is not personally responsible for his political acts, but that the responsibility for them is attached to his advisers. This principle may be considered the keystone of the existing constitution of this country. It has had the twofold effect of increasing the security of the Crown, by averting from the Sovereign the odium of unpopular acts of government; and of increasing the power of Parliament, by enabling it, by its power over ministers of the Crown, to correct or restrain maladministration.

For injuries proceeding from the Crown, and affecting the rights of *property*, the law provides various remedies: one of these is by *petition of right*, which is said to owe its origin to Edward I. (*a*). This remedy is resorted to where the Crown is in possession of hereditaments or chattels, and the petitioner controverts the title of the Crown; whereupon this answer, being endorsed on the petition, *soit droit fait al partie*, a commission shall issue to inquire of the truth of the suggestion, and the merits shall be determined as in suits between subjects. An analogous proceeding by *monstrans de droit*, is resorted to where the King's title and that of the private claimant appear by matter of record. The origin of this process has been controverted, but it is considered by Lord Somers to have been given by the sta-

(*a*) 14 Edw. III. c. 14 provides a mode of procedure where a man hath demanded, by petition in Parliament, lands which be in the King's hands. To avoid delay, they who sue for the King shall be put to answer, and defend the lands, according to the law, within a limited time.

tute 36 Edw. III. c. 13, by which claimants of land seised into the King's hands by escheat might proceed in Chancery to show their right (*monstrer son droit*) (*a*).

Petitions of Right are now cognizable by the superior courts of common law and equity, and the practice and procedure in actions and suits between subjects is extended to these petitions. A judgment that the suppliant is entitled to relief has the same effect as the judgment formerly called *amoveas manus*, by which, says Blackstone, "the Crown is instantly out of possession, so that there needs not the indecent interposition of his own officers to transfer possession from the Sovereign to the party aggrieved" (*b*).

ii. *Immunities of Ambassadors.*—The class of persons whose exemptions from the processes of courts of law most nearly resemble the exemptions of the Crown, are *Ambassadors*. There has been much dispute whether the exemption of ambassadors extends only to such crimes as are *mala prohibita*, or also to those which are *mala in se*. Hale says (*c*),—"Those who are most strict after the rights and privileges of ambassadors, yet seem to agree that if he do not only conspire the death of the King, or the raising a rebellion against him, but actually attempt such an act, as actually or interpretatively is a consummation thereof, though possibly the full effect thereof do not ensue, yet he may be dealt withal as an enemy, and, by the law of nations, he may be put to death." On this passage Foster (*d*) observes that such a case "will, as his Lordship observeth, be always governed rather by prudential considerations, or what are generally called reasons of state, than by any fixed

(*a*) Bankers' case, 14 State Trials, 1; 3 Blackstone, 256. The precedents of Petitions of Right are very fully considered in 'A Letter to the Rt. Hon. Lord Cottenham, upon his Lordship's intended Motion for a Committee to Inquire and Report as to the Law and Practice of Petition of Right,' by T. Chisholme Anstey, Esq., Lond. 1845.

(*b*) The proceedings upon Petitions of Right have recently been considerably simplified and improved by the Act 23 & 24 Vict. c. 34.

(*c*) 1 Historia Placitorum Coronæ, 95.

(*d*) Foster's Crown Cases, 'Discourse on High Treason.'

rules of law; and as ambassadors generally act under direction, and by orders from their Sovereigns, they have seldom been proceeded against further than by imprisonment, seizing their papers, and sending them home in custody." Both Foster and Hale treat it as clear that, for murder and other capital offences, ambassadors and their associates have no exemption from the ordinary course of justice. But Blackstone says that the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime; and, therefore, few, if any, examples have happened within a century past where an ambassador has been punished for any offence, however atrocious in its nature. In respect to civil suits, an ambassador and his servants are exempt from arrest or distraint, or seizure of their goods (*a*).

iii. *Immunities of Ministerial and Judicial Officers.*—There were formerly many kinds of exemption from legal process which no longer exist. Of these, the most extensive was benefit of the clergy, *privilegium clericale*, which was principally of two kinds: exemption of consecrated places from criminal arrests, which was the foundation of sanctuaries: exemption of the persons of clerics from criminal process before the secular judges in particular cases (*b*). Part of these exemptions continued until modern times, but are now abolished. But the exemptions from legal process which now exist appear to arise almost universally on one or other of these two cases,—either where persons in various offices are exempt from suits and actions brought against them on account of things done in their offices, or where persons having public duties are protected from legal process because it would impede them from discharging their duties. In both cases the exemption depends

(*a*) 1 Hale's Hist. of Pleas of the Crown, 99; Foster, *ubi supra;* 1 Blackstone's Commentaries, 254.

(*b*) The privilege of sanctuary was limited by several statutes of Hen. VIII., and abolished by 21 Jac. I. c. 28, s. 7.

on considerations of public convenience. The only exception from this rule appears to be the personal privilege of peers and peeresses from arrest in civil suits; but this privilege of the peerage exists only in civil suits, and even in them protects only the persons, and not the property, of peers and peeresses(*a*).

Of the first of the two general classes of exemptions depending on considerations of public convenience, we have instances in the immunities of members of Parliament for what is done or spoken by them in Parliament, and in the immunities of judges and magistrates from suits and actions on account of anything done in their judicial capacity. Of the second of these two classes we have instances in the personal privilege of members of Parliament from arrest, which may impede their attendance in Parliament; of officers and suitors in courts of law from arrest, which may impede their attendance upon the courts; of governors of colonies, military commanders, and others, from being taken in execution so as to hinder their departure on foreign service, and in some other cases. The law on this subject it is not intended to completely examine here, but it is obvious that the exemptions in question, where they relate to persons having great authority, might, if abused, enable such persons to exert a despotic power with impunity; and accordingly we find that the claim of such exemptions has given rise to questions of great constitutional importance.

(*a*) It is said that the ground of the ancient feudal privilege of barons from arrest in civil suits was the assumption of law that there would always be upon their baronies sufficient to distrain for the satisfaction of any debt. (West's Inquiry into the Manner of Creating Peers, second edit. p. 27.)

"Against a peer, he being always presumed to have an estate in land, no *capias* lies." (Gilbert's History of the Court of King's Bench, annexed to 'The Law of Executors,' p. 309.)

So late as the year 1776, the Duchess of Kingston, found guilty by the House of Lords of bigamy, escaped punishment by pleading certain statutes, one of which (1 Edw. VI. c. 12) exempted peers, convicted of certain felonies for the first time only, from the usual penalties. (20 State Trials, 355.) By 4 & 5 Vict. c. 22, peers convicted of indictable offences are liable to the same punishment as other subjects.

With regard to the liability of persons in office for illegal acts authorized by them, the law makes a distinction between *ministerial* and *judicial* officers, and another distinction with respect to judicial officers between acts done by them wrongfully but within their jurisdiction, and acts done in excess of their jurisdiction.

By the law of England, if an action be brought against a judge of a court of justice subject to a superior review, for an error committed by him in his judicial capacity, he may plead that he acted within his jurisdiction as a judge, and that will be a complete justification (*a*). A striking illustration of this principle occurred in certain proceedings arising out of Bushell's case above referred to. We have already stated that Bushell was foreman of a jury which had been fined and committed by a court of *oyer et terminer*, held before the Lord Mayor; and that it was decided that such fining and committal were illegal. Yet, notwithstanding this decision, when one of the jury brought an action against the Lord Mayor for false imprisonment, it was held by the Court of Common Pleas that such an action would not lie. The judges observed that the court which fined the jury, being one which had jurisdiction of the cause tried by that jury, and having authority to punish a misdemeanour in the jury, had thought it to be a misdemeanour in the jury to acquit the prisoners, when in truth it was not so; and therefore it was an error in their judgment, for which no action would lie (*b*).

Hale puts the following case in which a judge would be criminally responsible for excess of jurisdiction:—"If he that gives judgment of death against a person hath no commission at all, if sentence of death be commanded to be executed by such person, and be executed accordingly, it is murder in him that commands it to be executed, for it was *coram non judice*" (*c*).

(*a*) Lord Mansfield's judgment in Fabrigas *v.* Mostyn, 20 State Trials, 228.
(*b*) Hamond *v.* Howell, 'Modern Reports,' vol. i. p. 184; vol. ii. p. 218.
(*c*) 1 Hale's 'Pleas of the Crown,' ch. 42. If a commission issue to

Excess of jurisdiction by a judge or person acting in a judicial capacity may render him liable, not only criminally, but also civilly, to the person injured. Thus, in one case where a person not liable to martial law had been tried by court-martial and sentenced to be flogged, he recovered heavy damages against a governor who had done nothing but confirm the sentence(*a*).

Judges have from very remote times been punishable by impeachment for corruption, and instances of such punishments have been cited in a former chapter(*b*). Also, in particular cases, judges are rendered liable to penalties by statute; thus, by the Act abolishing the Star Chamber, 16 Car. I. c. 10, s. 6, any judge or justice offending against that Act is made subject to heavy fines; and by the Habeas Corpus Act, 31 Car. II. c. 2, s. 9, the Lord Chancellor, or any judge of the superior courts of common law, for denying a *habeas corpus* required by that Act, is liable to forfeit five hundred pounds to the party grieved.

The distinction between judicial and ministerial officers, with respect to immunity from the consequences of official

several commissioners, of whom A. or B. shall be one, to try indictments, and the rest proceed without A. or B., it is a high misdemeanour in the judges so proceeding, "and little (if anything) short of murder in them all, in case the person so attainted be executed and suffer death." (4 Blackstone, 391.)

"If a lieutenant, or other that hath commission of martial authority, in time of peace hang, or otherwise execute any man by colour of martial law, this is murder, for this is against Magna Charta." (3 Coke's Inst. 52.)

The principal modern statute for the protection of justices of the peace from vexatious actions, for acts done by them in execution of their offices, is 11 & 12 Vict. c. 44. By that statute an action against a justice for any act done by him with respect to a matter within his jurisdiction, must be founded on allegation and proof, that he acted maliciously and without reasonable and probable cause. For an act done by him in excess of his jurisdiction, an action may lie without such an allegation.

The magistrate's duty of admitting to bail being judicial, no action can be sustained against him except on proof of malice. (Linford *v.* Fitzroy, 13 Q. B. 240.)

(*a*) Conner *v.* Sabine, cited by Lord Mansfield in Fabrigas *v.* Mostyn, 20 State Trials, p. 232; see p. 218.

(*b*) *Ante*, Book II. Ch. III.

acts, is well illustrated by the great case of Barnardiston and Soame(*a*), which was an action against a sheriff for *maliciously* making a false return of members to Parliament. It was agreed in that case that an action against a judicial officer for a wrongful judicial act, even though done maliciously, would not lie. One question was, whether the sheriff, in making this return, acted in a judicial capacity. Lord Chief Justice North, who was one of those of the judges who held him not liable, did so on this ground, among others, that he acted judicially. Sir Robert Atkins, one of the judges who held that the sheriff was liable to an action for damages for making the improper return, took the ground that he acted ministerially and not judicially.

The same contention arose in another case of great constitutional interest, Fabrigas *v.* Mostyn(*b*), in which an action was brought, A.D. 1773, against the governor of the island of Minorca, for illegally imprisoning and banishing the plaintiff. The jury before whom the action was tried found a verdict for the plaintiff with great damages. This verdict came under the consideration of the Court of King's Bench, and there the governor's responsibility in the action was considered to depend on the question whether he acted judicially or administratively. The Court of King's Bench held that he acted as governor, and not as judge, and was therefore liable. "It has been singled out," said Lord Mansfield, "that in a colony that is beyond the seas, but part of the dominions of the Crown of England, though an action would lie for injuries committed by other persons, yet it shall not lie against the governor. Now I say, for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor. . . . This is a charge against him, which, though a civil injury, has a mixture of criminality in it; it is an assault, which is criminal by the laws of England, and is an abuse of that authority given him by the King's Letters-Patent under the Great Seal. Now, if everything within a dominion is triable by the Courts within that dominion,

(*a*) 6 State Trials, 1063. (*b*) 20 State Trials, 81.

yet the consequences of the King's Letters-Patent, which give the power, must be tried here, for nothing concerning the seignory can be tried in the place where it is. . . . So that emphatically the governor must be tried in England to see whether he has exercised legally and properly that authority given him by the King's Letters-Patent, or whether he abused that authority contrary to the law of England which governs the Letters-Patent by which he is appointed. . . . To lay down in an English court of justice such monstrous propositions, as that a governor, acting by virtue of Letters-Patent under the Great Seal, can do what he pleases, that he is accountable to God and his own conscience; and to maintain here that every governor in every place can act absolutely; that he may spoil, plunder, affect their bodies and their liberty, and is accountable to nobody, is a doctrine not to be maintained, for if he is not accountable in this Court he is accountable nowhere. The King in Council has no jurisdiction of this matter; they cannot do it in any shape; they cannot give damages; they cannot give reparation; they cannot punish; they cannot hold plea in any way. Wherever complaints have been before the King in Council, it has been with a view to remove the governor; it has been with a view to take the commission from him which he held at the pleasure of the Crown. But suppose he holds nothing of the Crown, suppose his government is at an end, and that he is in England, they have no jurisdiction to make reparation to the party injured; they have no jurisdiction to punish in any shape the man that has committed the injury."

Another case which throws much light on the principles of English law, as to the responsibility of persons holding administrative and judicial offices under the Crown, was the case(*a*) of Governor Picton, indicted here, in 1804, for a misdemeanour committed by him while governor of the island of Trinidad upon a woman of that island. She had been accused of robbery, and by the authority of a judge

(*a*) 30 State Trials, 225.

of the island an application was made to the governor to order torture to be inflicted upon her to induce her to confess; the order was given by him, and executed accordingly. The facts of the case were found by a special verdict, by which the jury found also, that by the law of Spain torture was allowed in the island at the time of its cession to Great Britain, and they negatived malice on the part of the defendant. This verdict came under the consideration of the Court of King's Bench. The prosecution, which seems to have been conducted at the expense of the Government, was abandoned before the Court gave its decision; but the arguments in the case elucidate many points connected with the subject before us. The defence was, that the act complained of was done by the defendant in the exercise of his judicial functions, and therefore was not the subject of a civil action or criminal proceeding. The principal grounds taken by the argument for the prosecution were, that the Spanish law authorizing infliction of torture was one which, by the principles of the British constitution, was annulled as soon as the island became part of the British dominions; that therefore torture being illegal, the order of Governor Picton, even if taken to have been judicial, was in excess of his jurisdiction; but it was also contended that the order was not given by him in a judicial capacity. It seems to have been conceded by the defendant's counsel that the mere absence of personal malice was not a sufficient justification of the order, unless the defendant were taken to have acted in a judicial capacity.

An important distinction with respect to the *extent* of the immunities of persons holding offices under the Crown was made in the case of Hill *v.* Bigge(*a*), in which it was decided by the Privy Council that a Court of Trinidad was competent to *try* an action against the actual governor of the island, though the judgment of the Court might not be enforceable against him during his governorship. Lord Brougham, who delivered the judgment of the Privy Council,

(*a*) 3 Moore's Privy Council Cases, p. 465.

after referring to numerous cases in which formerly the Crown granted to its servants protection from suits, observed, that "those protections were a provision made by the old law for the security of persons in the foreign service of the Crown, as commanders of armies, ambassadors, and doubtless governors of the continental dominions also. (Co. Litt. 130 a.) It therefore is not at all necessary that in holding a governor liable to be sued, we should hold his person liable to arrest while on service, that is, while resident in his government. . . . The inconveniences which would result from a general officer, or an ambassador, being taken in execution on the eve of his departure on service abroad, or the mischief that would ensue to the administration of justice from a judge being taken in execution almost at any time, are quite undeniable; but equally certain it is that these inconveniences afford no argument whatever against the unquestionable liability of all those functionaries to undergo, like the rest of the King's subjects, the process of law."

iv. *Temporary Immunities.*—We have already had occasion to refer to the exemptions from legal process claimed by persons having "privilege of Parliament." The privilege was formerly extended so far as to protect, not only members of Parliament, but also their servants, from all civil actions and suits during the time over which the privilege extended; but the privilege is now limited to the exemption of members themselves from arrest on civil process. This immunity belongs to the second of the classes already referred to, of immunities founded on public convenience. "There is not," it is said(*a*), "a single instance of a member's claiming the privilege of Parliament to withdraw himself from the criminal law of the land; for offences against the public peace they always thought themselves amenable to the laws of their country. They were contented with being substantially secured from any violence of the Crown or its ministers; but readily sub-

(*a*) 1 Hatsell, 206.

mitted themselves to the judicature of the King's Bench, the legal court of criminal jurisdiction: well knowing that privilege which is allowed in case of public service for the commonwealth must not be used for the danger of the commonwealth."

Besides the exemptions from legal process which have been here particularized, there are some others of a temporary and limited character; such as the privilege of suitors and others attending courts of law from arrest; all of which will, it is believed, be found on examination to depend on considerations of public policy, being exemptions created to prevent impediments to the discharge of public duties. To the same class we may fairly assign the immunities of military and naval authorities, who are not responsible to the ordinary judicature for punishments inflicted by them in accordance with the laws affecting the army and navy. These laws are made or authorized by statutes: with respect to the army and to marine forces while on shore, by the annual Mutiny Acts, which authorize articles of war for maintaining the discipline of those forces; with respect to naval forces, by permanent Acts of Parliament(*a*). It is only by virtue of these Acts that military and naval authorities can safely authorize punishments of persons subject to their authority; and where, by excess of the powers given by the Acts, injuries cognizable by the ordinary judicature are inflicted, they will be redressed by the ordinary courts. Thus, in a case already cited, a military commander was adjudged to pay heavy damages to a person who had been sentenced by a court-martial to be flogged, but who proved to be a person not liable to martial law. In a recent case, a military officer, who had committed manslaughter in India, was sentenced to imprisonment there; the military authorities, by a misapprehension of their powers, sent him (but without the requisite formalities), to this country to undergo his imprisonment here. The Court of Queen's Bench reluctantly held that, as he had not committed any crime

(*a*) See *infra*, Book III. Ch. VIII.

within the jurisdiction of the common law courts of this country, he must be set at liberty(*a*); and he afterwards maintained actions of false imprisonment against several persons concerned in his imprisonment.

To the exemptions above referred to must be added those which, for strictly limited purposes and periods, Parliament has in times of great emergency provided, by suspending the process of *habeas corpus*. With these exceptions, it may be safely asserted that every power and every person in the state are subject to its ordinary judicature; and we arrive at the important conclusion, that there are in this country no immunities from the ordinary processes of the law, but those which the law itself has strictly and jealously defined; and that those immunities are entirely founded upon considerations of public convenience. This result presents the strongest feature of contrast between the English Constitution and that of every other country; for it can scarcely be disputed that in no other country is the supremacy of the law so effectually guarded.

2. THE HISTORY OF STATE IMPRISONMENTS AND PROSECUTIONS.—The foregoing considerations suggest a very important question,—*How* is the supremacy of the law secured? By what machinery has the law contrived to render the whole community amenable to its power?

The complete answer to this question would involve a general investigation as to the effectiveness of the law for the repression of crimes and injuries in all cases. But it is clear that a great part of such an investigation is foreign to an inquiry into the general principles of the Constitution. What we are here principally concerned with is the effectiveness of the law to restrain great and powerful offenders, and especially to give redress for injuries committed by the administrative power. It will be convenient to preface the inquiry into this subject by some historical particulars respecting State imprisonments and State prosecutions, which

(*a*) *Re* Allen, 7 Jurist, New Series, 234.

two topics—to avoid unnecessary divisions—may be here considered together.

It is an important principle of the common law that it makes no distinction between state offences and others(*a*). In the Parliamentary conferences on the Liberty of the Subject, in 1638, Serjeant Ashley, who argued on behalf of the Crown, having said that "for offences against the state in case of state government, the King and his Council have lawful power to punish by imprisonment without showing particular cause, where it may tend to the disclosing of State Government," was committed to custody, and not discharged until he apologized for his speech(*b*).

But though it is a principle of common law to make no distinction between State offences and others—though the law does not recognise any class of crimes by the designation of State offences triable, or punishable by methods not prescribed by the law, yet it must not be overlooked that what are ordinarily called State Trials rarely led to acquittals until a comparatively recent period of our history. In ancient times, more especially in the reign of Henry VIII., when from the devastation made by the civil wars among the ancient nobility, and other causes, disturbing the balance of the Constitution, the influence of the Crown was become exorbitant, and seems to have been in its zenith, to be accused of a crime against the state and to be convicted were almost the same things. The one was usually so certain a consequence of the other, that exclusively of Lord Dacres's case in the reign of Henry VIII., and that of Sir Nicholas Throckmorton in his daughter Mary's, the examples to the contrary are very rare(*c*). Until juries became independent, the result could hardly be otherwise.

The right of *commitment* by the Crown or its Ministers is usually considered to be established by the Statute of Westminster the First, 3 Ed. I. c. 15, which declares in what

(*a*) 19 State Trials, 1073.

(*b*) 3 State Trials, 151; 19 State Trials, 1073.

(*c*) Hargrave's note to the trial of Lord Dacres. (1 State Trials, 407.)

cases of persons in custody the sheriffs may *replevy*, that is, let them go at large upon pledge or security. The Act declares certain cases in which it had been previously determined that men were not to be so discharged, including the cases where a man is arrested by commandment of the King or his justices (*per commaundement le Roi ou ses justices*). The Act provides, among other things, that prisoners "for treason touching the King himself shall be in no way replevisable"(*a*).

The power of the Courts at Westminster to bail persons committed to custody by the King's Council or Ministers has been the subject of frequent dispute in almost every reign since that statute was enacted. But going no further back than the reign of Elizabeth, we find that there were then numerous committals by the Council, of which the judges made a formal complaint in articles addressed to the Lords Chancellor and Treasurer, praying that "subjects may not be committed or detained in prison by commandment of any nobleman or counsellor against the laws of the realm." In answer to the question in what cases the judges ought not to deliver persons in custody by command of the Queen or the Council, the judges' reply is confined to stating that in cases of high treason such persons ought not to be delivered before trial; but they intimate that in all cases the cause for which the prisoner is in custody ought to be shown. After these articles were delivered, the committals complained of were less frequent(*b*).

(*a*) "Forasmuch as before this time it was not determined which persons were replevisable and which not, but only those that were taken for the death of man, or by commandment of the King, or of his justices, or for the arrest: it is provided, and by the King commanded, that such prisoners as before were outlawed, and they which have abjured the realm, provors, and such as be taken with the manour, and those which have broken the King's prison, thieves openly defamed and known, and such as be appealed by provors, so long as the provors be living (if they be not of good name), and such as be taken for house-burning, feloniously done, or for false money, or for counterfeiting the King's seal, or persons excommunicate taken at the request of the bishop, or for manifest offences, or *for treason touching the King himself*, shall be in no wise replevisable."

(*b*) See debates in Parliament on the Liberty of the Subject, in 1628

In 3 Car. I., A.D. 1628, occurred the memorable dispute between Parliament and the Crown, which was terminated by the King's assent to the Petition of Rights. Sir Thomas Darnel and other gentlemen, who had refused to lend money on loan required by the King, were imprisoned, and brought their *habeas corpus* in the King's Bench to procure their release. The return to the writ of *habeas corpus* was that they were in custody by "the special command of his Majesty." After a very learned and protracted argument, the judges held this return sufficient, and that the prisoners must be remitted to the former custody. Upon this decision arose debates in the House of Commons, and conferences with the House of Lords of unparalleled length, in which immense research into the law of commitments by the Crown was displayed. It was objected to Sir Edward Coke, who was one of the most zealous opponents of the claims of the Crown, that he had formerly held that, where the commitment was *per mandatum concilii*, the cause of commitment need not be disclosed; and that if the Privy Council commit one, he is not bailable by any court of justice. Coke replied, that in that decision he had been misled by the law book on which he relied, and that in looking into the original records he was satisfied of his error. These records were produced and minutely examined by Coke, Selden, and other eminent lawyers in the conferences with the House of Lords, and finally the two Houses agreed to the Petition of Right, which (with respect to commitments by the King's command), recites that, "contrary to the good laws and statutes of your realm to that end provided," divers subjects had been committed without cause shown; and that on proceedings of *habeas corpus* they had been remanded, though "no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council." The petition prays "that no free man in any such manner as is be-

(3 State Trials, 76); and Lord Camden's judgment in Entick *v.* Carrington. 19 State Trials, 1054.)

fore mentioned be imprisoned or detained," and ultimately received the Royal assent in the manner stated in a preceding chapter(*a*).

The reigns of Charles II. and James II. constitute an important epoch in the history of those popular rights which are frequently designated "the Liberty of the Subject." With reference to this period, we may here advert to a distinction which is often made between the theoretical and practical perfection of the law. This distinction, which assumes that the law may be perfect in theory but ineffectual in practice, is not a very substantial one, for an essential part of the law is its own practice and procedure; and if these be insufficient, the law itself is imperfect in an essential particular. Sir William Blackstone makes the distinction in question in the following passage: —"The point of time at which I would choose to fix the *theoretical* perfection of our public law is the year 1679, after the Habeas Corpus Act was passed, and that for licensing the Press had expired, though the years which immediately followed it were times of great *practical* oppression"(*b*). This observation suggests a question very pertinent to the

(*a*) *Ante*, p. 48.

(*b*) 4 Comm., 439.

Upon this passage in Blackstone, Fox, in his 'History of the Reign of James II.' (Introductory chapter, p. 23, quarto ed.), observes,—"Here we are, then, at the best moment of the best Constitution that ever human wisdom framed. What follows? A time of oppression and misery, not arising from external or accidental causes, such as war, pestilence, or famine, nor even from any such alteration of the laws as might be supposed to impair this boasted perfection, but from a corrupt and wicked administration, which all the so much admired checks of the Constitution were not able to prevent. How vain, then, how idle, how presumptuous is the opinion that laws can do everything! and how weak and pernicious the maxim founded upon it, that measures, not men, are to be attended to!"

If this conclusion were accurate, it would follow that it is comparatively unimportant what Constitution we live under; for surely the primary requisite of a good Constitution is that it secures the impartial administration of justice. It is the object of the following pages to show that the Constitution, instead of being theoretically perfect at the time referred to by Blackstone and Fox, was defective, because it did not secure (as it has since done) the independence of judges and juries.

present inquiry, viz. what was the reason of the maladministration of the law at the period referred to? What improvements have since been introduced which secure the due administration of the law now? The assertion of Blackstone, that the law attained to a theoretical perfection in 1679 (31 Car. II.), is true in this sense, that all the great constitutional *methods of procedure* for protecting the liberty of the subject then existed. These remedies and methods are, as we shall see presently, principally these—impeachments, trial by peers, trial by jury, the writ of *habeas corpus*, and some other prerogative writs, gaol delivery, and actions for false imprisonment. All these existed in 1679, in nearly the same form as at present. The difference between those times and our own must be attributed, not to the invention of new legal processes, but to some other cause; and that cause appears to be the subsequent security for the independence of judges and juries.

What makes the ineffectiveness of the law to maintain the liberty of the subject in the reigns of Charles II. and James II. the more remarkable, is the circumstance that in the preceding reign of Charles I. the Petition of Right, which was intended to maintain that liberty, was settled, after the most profound investigation and debate, by some of the greatest constitutional lawyers and statesmen which this country ever produced. The Petition of Right, however, enacted no new methods of judicial procedure, but was limited to a declaration of existing rights and provisions against illegal commitments, and remedies of certain grievances respecting soldiers and martial law.

Later in the reign the Star Chamber was abolished, and the remedy, by *habeas corpus*, greatly extended by 16 Car. I. c. 10. The latter remedy was further extended by the celebrated Habeas Corpus Act of 31 Car. II. This improvement of the method of *habeas corpus* was found in a great measure sufficient for its intended purpose of restraining illegal commitments; and such commitments seem to have been but a small part of the "oppression" which Black-

stone says was exercised after that time. It seems clear, that at the end of the reign of Charles II. and in the reign of James II., though illegal imprisonments were not wholly discontinued, *habeas corpus* was frequently and successfully resorted to as a remedy against them. The complaints of the people with respect to the administration of justice were, that judges and juries were corrupt, and that injuries were committed, not, as theretofore, in violation or evasion of law, but under its sanction.

The judges themselves were not insensible of this scandal. On a trial in 36 Car. II., A.D. 1684, Lord Chief-Justice Jefferies said, "I am glad that we are now to debate this matter with men of the robe, because we have had a strange sort of notions and reflections spread abroad of late, as though judges nowadays gave strange sort of opinions, and as though persons that had been blemishes at the bar were preferred to do strange things when they come to the bench"(*a*). The public opinion of the judicial bench found an echo in the House of Commons. In the debates on the impeachment of Lord Chief Justice Scroggs, in 1680, one member, Sir H. Capel, said, "I observe that these judges are grown omnipotent; they have done those things that they should have left undone. This is very fine, that judges who must be upon the Bench must be dropped at Whitehall before they come to Westminster Hall, and I know what law we must have if they take instructions from those that advised the proclamation against petitioning." Another member (Sir F. Winnington) said, "Sir, I think we are come to the old times again, when the judges pretended they had a rule of government as well as a rule of law, and that they have acted accordingly." The articles of impeachment exhibited by the House of Commons against Scroggs, charged him with numerous acts of partiality and misconduct in his office; and the impeachment of some other judges was at the same time resolved upon, but not proceeded with(*b*).

(*a*) Trial of John Hampden for misdemeanour. (9 State Trials, 1058.)
(*b*) 8 State Trials, 163.

We have seen in a previous chapter that the practice of securing the subservience of judges to the Crown, by frequent removals of independent judges, became most prevalent in the reigns of Charles II. and his successor. In the previous reign the practice was not unknown, but received some check, probably from the resolution of the House of Lords in favour of the continuance of the judges in their offices during good behaviour. It was not, however, till the reign of William III. that this rule was enacted by Parliament, and not then without considerable reluctance on the part of the King or his advisers (*a*).

Another important ground of complaint against the administration of the law in the times of Charles II. and James II., was the method of selecting juries. The sheriff had then far more power than now in selecting juries according to his own will. As we have seen in a previous chapter (*a*), the functions of the sheriff with respect to the formation of juries are now in a great measure superseded by a different machinery; but in the time of Charles II., and for a long while afterwards, the sheriff had, with respect to the formation of juries, great power, the partial exercise of which was one of the principal instruments upon which the Court relied for rendering the judicature subservient to its purposes. The state trials of that reign are fearful examples of the prostitution of the judicature to political purposes; and, as we have shown, the most strenuous exertions were made by the Crown to retain its power of packing juries. Where this failed, and the jury was found not sufficiently complaisant, the Court party had yet another method of securing their compliance. The jury might, by threats of fine and imprisonment, be coerced into giving an agreeable verdict. The latter iniquity received its death-blow towards the end of the same reign; but the former—the power of packing juries by the aid of the sheriff—was not effectually restrained until after the Revolution.

The contest of the Court party for irresponsible power

(*a*) *Ante*, Book II. Ch. III.

was, in the time of Charles II., carried on more actively in the Courts of Law than in Parliament, The judicature reached a depth of debasement happily unparalleled in any other period of its history. Parliament, indeed, did something to rescue it from this degradation, but still left in the hands of the Executive Government the power of using the Courts of Law as its tools, and that power was fully exercised. These considerations effectually dispose of Blackstone's statement that the Constitution was then theoretically perfect, and fully explain why, notwithstanding this supposed perfection, the Crown and the Ministers were able to practise the oppression of which he complains.

The proposition that the laws may be theoretically perfect, and yet practically oppressive, deserves great attention, for it strikes at the very root of constitutional science. The learned editor of the State Trials, Mr. Emlyn, writing in 1730, thus adverts to the laws relating to the "Liberty of the Subject," and the manner in which those laws were then observed:—"Some will be ready to object that if these laws were in force, that a subject shall not be compelled to serve the King out of the realm, how comes it to pass that divers subjects (not mariners only) have been taken by press warrants, and by force put aboard ship, and carried beyond sea? If it be not lawful to commit to any but ancient accustomed gaols, how comes it about that so many persons have been taken up by Messengers, who have imprisoned them in their own houses, detaining them there, not for two or three days only (the time allowed by law to take their examinations), but for weeks or months; thereby making gaols of their houses, though they have neither the grant of such a franchise, nor any Act of Parliament to make them so? These are questions to which I will not undertake to give a satisfactory answer, but shall leave that to others who are more nearly concerned, and better able to do it. I can only say that, whatever may in fact have been practised, I do not know that such practices have ever had the sanction of one judicial determination, and, for my

part, must confess myself unable to reconcile them with the law of the land."

The questions here put admit of a much more satisfactory answer now than could have been given when this passage was written. The cases of illegal detention here stated are, firstly, detention by press warrants; and secondly, imprisonment by "messengers." With respect to the first, the practice of impressing seamen for the Royal service is of very ancient date, has long continued, and has been repeatedly recognized by legal decisions and modern statutes(*a*). The impressment of persons not mariners, and not subject to the impress service, has been effectually restrained since Mr. Emlyn wrote by legal decisions that such illegal impressment is a trespass remediable by damages(*b*). In the second place, imprisonment upon warrants issued by the Secretaries of State to King's messengers, commanding them to seize persons described as the authors, printers, or publishers of seditious libels, were, in the year 1765, condemned by several judicial decisions and resolutions of the House of Commons.

The power of the King's Ministers to commit persons to custody was the subject of important trials in 1765, connected with certain political publications, including the celebrated paper the 'North Briton,' No. 45. Lord Halifax issued a warrant to some of the King's messengers, directing them to apprehend the authors, printers, and publishers of that paper. One of the persons apprehended under this warrant brought an action of false imprisonment against the King's messengers, and recovered damages. The result of this trial subsequently came under the consideration of the Court of Queen's Bench, which affirmed the judgment professedly on the ground that the warrant had not been pursued, because it was not shown that the per-

(*a*) 1 Stewart's Blackstone, 525.

(*b*) An arrest and detention under an impress warrant may be lawful, but the party executing it does so at his peril; for if he take a man not liable to be impressed, as, for instance, a person who has never served at sea, he is guilty of false imprisonment. (Hewster *v.* Royle, 1 Campbell's Reports, 187.)

son apprehended was one of the persons designated by the warrant. Most of the judges also expressed a clear opinion that the issue by a Secretary of State of *general* warrants —that is, warrants in which the person to be apprehended was not named nor described with certainty, was illegal(*a*). In a similar case(*b*), which was tried in the same year, Lord Halifax had issued a warrant to some of the King's messengers to take into custody John Entick, named and described as author of the "Monitor," and to seize his books and papers. The papers were seized accordingly. Entick brought an action against the messengers, and recovered heavy damages. The questions of law arising in this case were considered by the Court of King's Bench, and its decision was given by Lord Chief Justice Camden in an elaborate judgment, in which he fully considered the authority of the Privy Council, and of the Secretary of State, to commit persons to custody and seize their papers. He made a distinction between a commitment by warrant of Privy Councillors *in council*, and a warrant by Privy Councillors individually; and held that the latter had not power to commit except for treason, and that the office of Secretary of State did not confer such a power. He held also that the Secretary of State had no power to warrant the seizure of papers. This judgment was followed by resolutions of the House of Commons, in 1766, declaring the seizure of papers in the cases of libel, to be illegal, and declaring general warrants to be illegal in cases of libel and all other cases except those provided for by Act of Parliament.

It has been said by Lord Mansfield(*c*), that general warrants are no warrants at all, because they name no one; but he objected to the declaratory resolution of the House of Commons just mentioned, on the ground that declarations

(*a*) Leach *v.* King's Messengers, 19 State Trials, 1001.

(*b*) Entick *v.* Carrington, 19 State Trials, 1029.

(*c*) In a speech in the House of Lords, quoted by Lord Chief Justice Denman in his judgment in Stockdale *v.* Hansard. (9 Adolphus and Ellis, Rep. 139.)

of law by either House of Parliament are not binding on courts of law, and have no force or effect as laws.

3. METHODS BY WHICH THE SUPREMACY OF THE LAW IS SECURED.—Having thus reviewed some of the more important changes which have taken place in the administration of the law with respect to state imprisonments and prosecutions, we proceed to consider the principal remedies and modes of procedure by which the law is made effectual to restrain great and powerful offenders, and especially to give redress for injuries committed by the administrative government. This inquiry appears to be comprehended in the following topics:—i. The means which the law gives to prevent imprisonment or punishment without process of law. ii. The means adopted to compel the tribunals to discharge their duties. iii. The means of preventing powerful offenders from escaping justice.

i. *The means which the law gives to prevent imprisonment or punishment without process of law.*—This subject is principally important with respect to the power of the Crown or its Ministers to commit accused persons to custody.

The foregoing review of the more important particulars of the history of the "Liberty of the Subject" will materially assist in showing the value of the remedies which the law has given against illegal commitments. These remedies we now proceed to consider. An excellent summary of them is given in the preface(*a*) to the State Trials just quoted, as follows:—"Nor does our law excel others only in defending the life of the subject against any injurious attacks, but also in its care and concern for the liberty and freedom of his person. How absolute soever the sovereigns of other nations may be, the King of England cannot take up or detain the meanest subject at his mere will and pleasure; it is one of the privileges confirmed by Magna Charta, that no man shall be restrained of his liberty but by the law of

(*a*) 1 State Trials, xxvi.

the land; that is, says Lord Coke, by indictment or presentment of good and lawful men, or by the King's writs out of his ordinary courts of justice, or by lawful warrants. Now every lawful warrant must be grounded upon oath; must plainly and specially express the cause of commitment; must be under the hand and seal of one who is authorized to do it, expressing his office, place, and authority whereby he committeth; and must conclude 'until he be delivered by due course of law,' and not 'until further order,' or with such-like conclusions. Nor has the law only prescribed what shall be necessary to a legal commitment, but it has also provided divers remedies in case any one should be illegally committed or detained. The party injured may have an action or indictment founded on Magna Charta, an action of false imprisonment, a writ *de homine replegiando*, a writ *de otio et atiâ.*

"But so precious is the liberty of a man's person in the eye of the law, that none of these remedies was thought sufficient, not giving so speedy a relief as the urgency of the case requires; another remedy is therefore provided, viz. the writ of *habeas corpus*, which is called *festinum remedium.* By this writ the gaoler is obliged immediately to bring the body of the prisoner before the Lord Chancellor, or one of the twelve judges, and to certify by whom, and for what cause, he stands committed; whereupon the Lord Chancellor or judge is required (unless he be legally committed for an offence not bailable by law) to discharge or bail him, except in cases of treason or felony plainly and specially expressed in the warrant; and even in those cases, that the innocent may not be worn and wasted with long imprisonment, the prisoner must be brought to his trial within a reasonable time; for if he be not indicted the next term or sessions after his commitment, having duly entered his prayer, he shall, on the last day of the term or sessions, be admitted to bail, unless it shall appear to the Court upon oath that the witnesses for the King could not then be produced; and then, if he be not indicted and

tried the second term or sessions after his commitment, he shall be quite discharged. (31 Car. II. c. 2.)

"But because all these precautions in favour of liberty may be rendered useless by sending the subject to remote or private prisons, whereby he may lose the benefit of the King's commission of gaol delivery, and the King's writs be rendered ineffectual by want of knowing where to direct them to; to prevent this inconvenience the law has further provided that no subject of England shall be sent prisoner into any part beyond the seas, either within or without the King's dominions (31 Car. II. c. 2. s. 12), nor shall be compelled against his will to serve the King out of the realm; lest, under pretence of service as ambassador or the like, he should be sent into real banishment. Nor can any be regularly imprisoned within the realm in any other place than the common county gaol, or other public accustomed goal; for which reason a gaoler cannot be authorized by any warrant to deliver his prisoner into the custody of an unknown person. Nor can any new gaol, according to the opinion of Lord Coke (2 Inst. 705), be erected but by Act of Parliament. One statute (5 Hen. IV. c. 10) ordains that none shall be imprisoned by justices of the peace—some say this extends to all other judges and justices—but in the common county gaol, saving to lords and others who have gaols their franchises."

The foregoing extract is given at length, because it shows very accurately and concisely the remedies by which the law protects the freedom of the subject. Some further particulars respecting these remedies may be here given conveniently in the order in which they are above referred to.

The remedies for illegal imprisonment first mentioned are by *indictment*, or by *action for false imprisonment*. False imprisonment is a misdemeanour at common law, punishable, upon indictment, with fine or imprisonment, or both. All that the prosecutor of such an indictment has to prove is the imprisonment; it is for the defendant to show that the imprisonment was legal, and he may justify it on one

or other of these grounds—that the prosecutor was arrested regularly under civil process out of a superior court, or other court having jurisdiction, or under a warrant from a magistrate to answer a criminal charge of which the magistrate has cognizance; or without warrant in certain cases where the person arrested commits, or threatens to commit, or is suspected of having committed an indictable offence; or under the order of a Court for a contempt committed in the face of the Court; and in certain other cases of lawful arrest under authority. Thus a magistrate may be justified in committing a material witness until the sessions, who refuses to appear or give security for appearing there. Naval and military officers have in many instances authority to imprison soldiers and seamen; but if the authority be exceeded, as where the imprisoment is cruel or unnecessarily prolonged, it is an indictable offence(*a*).

The *satisfactory* remedy for the injury of false imprisonment is by an *action of false imprisonment*, which is generally and almost unavoidably accompanied by a charge of assault and battery also; and in such action the party injured may recover damages awarded by a jury for the injury he has received(*b*). Some of the most important principles of the law

(*a*) Archbold, Pleading in Criminal Cases, 574.

If a sheriff or gaoler detain a prisoner in the gaol after his acquittal, this is false imprisonment. (2 Coke Inst. p. 53.)

(*b*) 3 Blackstone, 138.

The following are some of the instances in which such actions have been brought:—In 1630, one Huntley, who had been censured and imprisoned by the High Commission Court, brought actions of false imprisonment against the gaoler and commissioners, and the common law judges held that the action was maintainable. (See *ante*, Bk. ii. Ch. 3.) In the case of Ashby *v.* Simons, damages were recovered in an action for arresting the prosecutor in Essex upon a warrant for his arrest in London only. (19 State Trials, 692, note.) In Leach *v.* Three of the King's Messengers, and Entick *v.* Carrington, in 1765, actions were brought against the messengers for imprisoning the plaintiff under a warrant of a Secretary of State. In both these actions the magisterial power of a Secretary of State was disputed, and in each case the plaintiff obtained judgment. (19 State Trials, 1002, 1030.) Wilkes *v.* Wood was a similar action, in 1763, in which the celebrated John Wilkes recovered £1000 for false imprisonment under a Secretary of State's warrant. (*Ibid.* 1154.) In 1769 Wilkes recovered £4000 in a similar action against Lord

respecting the liberty of the subject have been established by means of such actions, which have been repeatedly prosecuted with success against great officers of the Crown, and others of inferior authority, and also against private persons. The remedy for false imprisonment by this action is more effectual than the remedy by indictment; for, in the first place, in an action the plaintiff may obtain compensation in damages; and in the second place, an action is not liable to be stopped by the *noli prosequi* of the Attorney-General, who, on behalf of the Crown, has a power of thus staying proceedings on any indictment or other prosecution at the suit of the Crown (*a*).

The next class of remedies above mentioned are the writs *de homine replegiando*, and the writ *de odio et atid*; two ancient writs, under which persons in custody might, in certain cases, be admitted to bail, upon giving security to the sheriff for their appearance to answer any charge against them (*b*). These writs have long been superseded as remedies for illegal confinement by the writs of *habeas corpus*, the most celebrated writs in English law.

There are several kinds of writs called writs of *habeas*

Halifax, the Secretary of State who issued the warrant; the expenses of defending the action were defrayed by the Crown. (*Ibid.* 1415.) In the case of Fabrigas *v.* Mostyn (cited previously in this chapter), damages to the amount of £3000 were recovered by the plaintiff from the Governor of Minorca, by whom he had been falsely imprisoned and banished. Wright *v.* Fitzgerald, in 1799, was an action against the High Sheriff of Tipperary, where martial law had been proclaimed, in 1798, under an Act of Parliament. The defendant ordered the plaintiff to be most inhumanly flogged, on a suspicion of disloyalty, without any kind of trial, and it afterwards appeared that there was no ground for the suspicion of disloyalty. The defendant relied on the Indemnity Act; but the judges held that the Act did not authorize him to inflict punishment until he had taken proper means to ascertain the guilt of the person punished, and the plaintiff recovered £500 damages. (27 State Trials, 759.)

(*a*) In 1771, the House of Commons ordered Miller, a printer, to be taken into custody for publishing debates. The messengers who executed the order were indicted at the printer's instance, but the Attorney-General stayed proceedings by a *noli prosequi*. (20 State Trials, 1391.)

(*b*) North, in his 'Examen,' speaking of the writ *de homine replegiando*, says, "This was the ancient remedy for the liberty of the subject, and is,

corpus, by which persons are brought before the courts for various purposes: the title 'habeas corpus' however is most generally used to designate the writ of *habeas corpus ad subjiciendum*. The object of this writ is to bring prisoners in whose behalf it is issued before a competent court, in order that the legality of the custody may be inquired into, and the prisoner thereupon either discharged or bailed or remanded to custody. The writ is granted judicially, upon motion; and wherever probable ground is shown that the prisoner is imprisoned without just cause, the writ is a writ of right, and may not be denied. Upon every commitment, the reason for which it is made ought to be expressed, that the court, upon a *habeas corpus*, may examine into its validity(*a*). The writ commands the day and the cause of the caption and detaining of the prisoner to be certified upon the *return* or answer to the writ; and the cause ought to appear as specifically and certainly to the judges of the return as it did appear to the court or person authorized to commit, or else the return is insufficient(*b*).

The legality of the cause of commitment is determined by the cause appearing by the *return*. The cause returned is for this purpose assumed to be true, and its truth cannot be disputed, because the writ is not framed nor adapted for litigating facts, and the determination of questions of fact does not belong to judges, but to juries. The judges determine whether the Return discloses a good or bad reason for the imprisonment, not whether the return is true or false. The statements of the Return can be disproved only in an action for a false return, or in some cases by an information or indictment, for the making a false Return

indeed, more effectual and expedite than an *habeas corpus*. The difference is, that the former is the process of the Government that took care of the people's liberties (wherefore men affected to style themselves the King's subjects) against the great men that tyrannized; and the latter is chiefly intended against the Government itself, and the abuses of its power." (Examen, A.D. 1682, part 3, chap. 8, § 13.)

(*a*) See 3 Blackstone, 129–133. (*b*) Bushell's case, *ante*, p. 370.

is an indictable offence. However, though the Return to a *habeas corpus* cannot be tried and set aside by affidavits, yet where it appears by such affidavits that a man has seized another by outrage, and has thereby committed a felony or misdemeanour, the court may commit him for trial(*a*).

The writ of *habeas corpus* is an ancient common-law writ, but its efficacy has been greatly increased by legislation in the time of Charles I. and Charles II. In both those reigns the judges, in several instanees, delayed or refused the benefit of this process to persons illegally imprisoned. We have already referred(*b*) to the famous debates on this subject in 3 Car. II., and the consequent Petition of Right, which recites cases in which the King's Bench had illegally refused to deliver on *habeas corpus* persons committed by the King's command, *without any cause assigned*, and enacts that no freeman hereafter shall be so imprisoned or detained. This provision was, however, evaded by the judges, and a further remedy was provided by the statute 16 Car. I. c. 10, s. 8, which enacts that a person committed by the King or Privy Council, or any of its members, shall have a writ of *habeas corpus* in the King's Bench or Common Pleas; and the court shall, within three court-days after the return, examine the legality of the return, and do what to justice shall appertain, in delivering, bailing, or remanding the prisoner. Yet in the case of a prisoner who, in 1676, was committed by the King (Car. II.) in Council for a speech at the Guildhall, the Chief Justice, as well as the Chancellor, refused the writ, on the ground that the writ could not issue in *vacation*(*c*). Other defects in the process of *habeas corpus* existed: the imprisoning party might delay obedience to the first writ, and wait till a second and a third, called an *alias* and a *pluries*, were issued be-

(*a*) Opinions and Judgments of Lord Chief-Justice Wilmot, p. 105 *et seq.*

(*b*) In the division of this chapter relating to the history of State Imprisonments and Prosecutions.

(*c*) Previously to the Habeas Corpus Act, 31 Car. II., there was no settled practice as to the issue of the writ in vacation. (Lord Chief-Justice Wilmot's Opinions, p. 104.)

fore he produced the prisoner. This and other evasions gave birth to the statute 31 Car. II. c. 2, entitled *An Act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas,* which is frequently considered another Magna Charta of the kingdom(*a*).

The principal provisions of the statute are briefly as follows:—

Every prisoner (unless committed for treason or felony, plainly expressed in the warrant) is to be brought personally within a limited time, never exceeding twenty days after service of an *habeas corpus* on the person having him in custody, before the court or judge before whom the writ is made returnable (s. 2).

The writ may be applied for in vacation as follows:—Any prisoner committed for any crime (except treason or felony, and except persons convict or in execution by legal process) may apply for the writ, or any one else may apply for it on his behalf. The application is to be made to the Lord Chancellor, or any superior common law judge; they are thereupon required, upon view of a copy of the commitment, or proof that a copy is denied, to grant the writ, returnable *immediatè* before the Court of Chancery or one of the superior law courts. The prisoner is to be brought up within the time before limited, and within two days after shall be discharged or bailed by the court before which he is brought, unless it appear he is duly detained on legal process or warrant (s. 3).

Officers and others are rendered liable to pecuniary and other penalties for disobedience to the writs, and also for neglect to give copies of warrants of commitment demanded on behalf of the prisoner (s. 5).

No person delivered on *habeas corpus* shall be recommitted for the same offence (s. 6).

Persons committed for treason or felony are entitled to their discharge if not tried within a limited time after commitment (s. 7).

(*a*) 3 Blackstone, 135.

Persons committed on a criminal charge are not to be removed from one custody to another, except in the cases specified in the Act (s. 9).

The judges denying *habeas corpus* required by the Act, are rendered liable to the penalty of five hundred pounds (s. 10).

No inhabitant of England is to be imprisoned out of England, except convicts lawfully transported, and persons who have committed capital offences in some other part of the British dominions, and are sent there to be tried (ss. 12–16).

After assizes proclaimed for any county, no prisoner shall be removed from gaol there by *habeas corpus* so as to avoid his trial at the assizes (s. 18).

Persons duly committed on charges of felony, and in other cases where they are not lawfully bailable, are not to be removed or bailed under the Act (s. 21).

This celebrated Act applied only to cases of imprisonment on criminal charges, all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But now by 56 Geo. III. c. 100, any superior common law judge may (if it shall appear by affidavit that there is probable and reasonable ground for complaint) in vacation award a *habeas corpus*, returnable immediately, to bring up the body of any person restrained of his liberty, (other than for some criminal matter, and except persons imprisoned upon civil process).

The writ might until recently be issued into any of the dominions of the Crown of England, where it was suggested that a British subject was illegally imprisoned. But by a late statute, it is provided that the writ shall not issue out of England into any colony where the colonial courts of justice have power to issue the writ and ensure its execution (*a*).

Parliament has on some occasions, by suspending the Habeas Corpus Act, authorized the Crown to imprison sus-

(*a*) *Re* Anderson, 7 Jurist, New Series, 123. 25 Vict. c. 20.

pected persons without giving any reason for so doing. The effect of a suspension of the Act is to prevent persons who are committed upon certain charges from being bailed, tried, or discharged during the time of the suspension, except under the provisions of the suspending Act; leaving, however, to the magistrate or person committing all the responsibility attending an illegal imprisonment. It has been common therefore, says Blackstone, to pass Acts of Indemnity subsequently, for the protection of those who either could not defend themselves in an action of false imprisonment without making improper disclosures of the information on which they acted, or who had done acts not strictly defensible, though justified by the necessity of the moment(*a*).

(*a*). 1 Comm., 136.

Among Acts suspending *habeas corpus*, and indemnifying Acts, are the following:—1 Will. & M. sess. 2, c. 8, "An Act for preventing vexatious suits against such as acted in order to bring in their Majesties, or for their service." (The Act recites that about the time of the accession of William III., divers disaffected persons had been necessarily imprisoned without warrant of law.) 2 Will. & M. sess. 2, c. 13, "An Act for preventing vexatious suits against such as acted for their Majesties', service in the defence of the kingdom."

By 1 Will. & M. c. 7, the Habeas Corpus Act is suspended for a limited time, and it is provided that persons imprisoned during that time under warrant signed by six Privy-Councillors, or by a Secretary of State, for suspicion of high treason, may be kept in custody without bail. Similar provision is made for a further period of some months, by an Act of the same session, 1 Will. & M. c. 19. A similar provision was made for part of the years 1695–96, by 7 & 8 Will. III. c. 11. The form of the Suspension Act, 6 Anne, c. 15 (in the authentic edition of the Statutes of the Realm, vol. viii. p. 815), is nearly similar. Other statutes to the like effect were passed in the subsequent reigns of George I., George II., George III. The main features of these Acts are that they suspend the operation of the Habeas Corpus Act for strictly limited periods, but only with respect to persons imprisoned on suspicion of treason, by warrant of six of the Privy Council, or a Secretary of State, and provide that such prisoners shall not be tried or bailed without warrant signed by six members of the Privy Council. See 34 Geo. III. c. 54.

Referring to the Acts for suspending the Habeas Corpus Act in the reign of William III., the House of Lords, in their address to the Crown, in the case of Ashby *v.* White, in 1704, observe that "so sacred was that law held, that those Acts passed with great reluctancy; and one of the arguments

The last species of remedy here to be considered is the process of *gaol delivery*. The commission of gaol delivery is one of the commissions delivered to the judges who hold the assizes periodically in every county, and empowers them to try and "deliver" every prisoner who shall be in the gaol when the judges arrive at the circuit-town, wherever or before whomsoever indicted, or for whatever crime committed. This is a commission instituted that men may not be long detained in prison without trial(*a*). The efficacy of the method of gaol delivery depends materially on the law prohibiting confinement of accused persons in unlawful prisons. The statute 5 Hen. IV. c. 10, already referred to, prohibits imprisonment by justices of the peace elsewhere than in the common gaol, "saving to the lords and others who have gaols their franchise in this case." This saving refers to gaols the government of which belonged by prescription or Royal grant to private persons(*b*); but all gaols

that prevailed most for agreeing to that temporary suspension was, that it would be an unanswerable evidence to all future times that this Act could never be suspended afterwards by any less authority than that of the whole legislature." (3 Hatsell, 301.)

In Bernardi's case, already referred to (Book II. Ch. IV. sect. 1), statutes were passed, in the reigns of William III., Anne, George I., and George II., by which Bernardi and others, accused of conspiracy to assassinate William III., were deprived of the benefit of *habeas corpus*, and were imprisoned for a long period of years.

As to the effect of the Indemnity Act, passed for the protection of magistrates and others engaged in suppressing the Irish Rebellion in 1798, see the case of Wright *v.* Fitzgerald, cited in a note to this section of the present chapter.

Contrasting the laws of England and other countries respecting the liberty of the subject, Blackstone states that during the mild administration of Cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single ground of the famous bull *Unigenitus*. These letters, which were signed by the King and countersigned by a Secretary of State, required the Governor of the Bastille, or other prison, to keep in custody a person named until further order. They seem to have been rarely employed for state purposes till the reign of Louis XIV., and in the reign of Louis XV. were openly sold and used as a means of private revenge. They were abolished at the French Revolution. (Penny Cyclopædia, art. "Cachet.")

(*a*) 4 Blackstone, 270; 4 Coke Inst. cap. 30; 9 Co. Litt. 119 *b*.

(*b*) *E. g.*, in 20 Edw. IV., the Abbot of St. Alban's had a grant of a gaol

are now under public management, and are regulated by numerous statutes, which provide for the classification and inspection of prisoners; nor can any new gaol be erected, but by Act of Parliament(*a*). In order to secure the complete delivery of gaols, it is provided by an ancient statute, 3 Hen. VII. c. 3, that every sheriff and other person having authority of keeping gaols or prisoners for felony, shall "certify the names of every such prisoner in their keeping, and of every prisoner to them committed for any such cause at the next general gaol delivery, in every county or franchise where any such gaol or gaols have been, or hereafter shall be, there to be kalendared before the justices of the deliverance of the same gaol."

ii. *The Modes of Procedure to compel Tribunals to discharge their Duties.*—The principal of these methods, with

and gaol delivery, which franchise he forfeited by unreasonable delay in suing forth a commission for the delivery of his gaol. In 5 Edw. IV., the Abbot of Crowland had a gaol, which franchise he forfeited by detaining prisoners after they had been acquitted of felony and paid their fees. (9 Coke's Reports, 96; Reynel's Case.) In the same case it was held that the Crown might grant the custody of a gaol to a man for life, or in fee, or at will, but not for a term of years. The custody of a gaol might be forfeited by misconduct of the keeper, as by permitting escapes, and thereupon be granted to another. This appears to have been done with respect to the wardenship of the Fleet, about the year 1690. (2 Vernon's Reports, 173.) This wardenship had previously been granted by Charles II., by letters-patent, to Sir Jeremy Whichcot and his heirs for ever, and in consideration of this grant he rebuilt the prison at his own expense. (Report to the House of Commons on the State of Gaols, 1729, cited 17 State Trials, 297.)

(*a*) 2 Coke's Inst. 705.

The former Acts for the regulation of prisons were consolidated by 4 Geo. IV. c. 64. There are also numerous later statutes relating to the management of prisons.

The law has, from very early times, been very strict against gaolers for cruelty and oppression, or other malfeasance in their office; and if a prisoner, by the duress of his gaoler, come to an untimely death, the gaoler is guilty of murder. If any man die in gaol, whether by disease or accident, the coroner must hold an inquest respecting the cause of his death. (3 Coke's Inst. ch. 29; East, Pleas of the Crown, ch. 5, § 92.) But the law in this respect was formerly shamefully evaded, and the Report to the House of Commons in 1729, above referred to, disclosed a fearful system of cruelty practised about that time in the Fleet Prison.

respect to courts of inferior jurisdiction, are by writs of *mandamus* and of *prohibition*.

Refusal or neglect of justice is remedied by the prerogative writ of *mandamus*. This writ may issue from the Court of Queen's Bench, but not from either of the other courts of Westminster(*a*). The writ issues (*inter alia*) to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever justice is delayed; for it is the business of the Court of Queen's Bench to superintend all inferior courts, and enforce due exercise of their powers. Therefore a *mandamus* may be had to the courts of the City of London to enter up judgment, to the spiritual courts to grant administration, and the like. The writ issues first in the alternative, commanding the performance of the duty, or that some reason be signified to the contrary; if the return or answer to the writ show an insufficient reason, then a *peremptory mandamus* issues. Formerly the Court of Queen's Bench would not try the *truth* of the return to the first *mandamus*, but only its sufficiency, assuming it to be true; and the party injured by a false return might maintain an action for damages against the party making the false return. Writs of *mandamus* were subject to the same principles as those just mentioned, which related to writs of *habeas corpus*. The law could not suffer the truth of the returns to be controverted, except on proceedings by regular trial before a jury. But in the 9th Anne, an Act of Parliament was obtained to permit the traversing returns to *mandamus* for certain offices; and now the provisions of that Act are extended, and the return to any *mandamus* may be objected to by plea, traverse, or demurrer, and the judgment of the Court thereon is subject to appeal by proceedings in "error"(*b*).

(*a*) That is a prerogative writ of *mandamus*; but a writ of *mandamus* for the performance of a private duty may be issued by any of the superior common law courts in an action for *mandamus*. (Com. Law Proc. Act, 1854, s. 68.)

(*b*) Wilmot's Opinions, p. 109; 3 Blackstone, 110; 1 Will. IV. c. 21, s. 3; 6 & 7 Vict. c. 67, ss. 1, 2.

An injury which is the converse of that just considered, is that of encroachment of jurisdiction, or calling one *coram non judice*, for which the common law has provided a remedy by the writ of *prohibition*. This writ, issued out of the Queen's Bench, and in some cases out of Chancery, the Common Pleas, and Exchequer, commands the judge and parties to a suit in an inferior court to cease from the prosecution of the suit on the ground that it does not appertain to that jurisdiction. The writ may be directed to inferior courts of common law and others, as the Ecclesiastical and Admiralty Courts.

The writ of prohibition is very celebrated in the history of the English Constitution, on account of the frequent struggles which it occasioned between the Civil and Ecclesiastical Courts. The nature of these contests, and of some of the earlier statutes defining the limits of ecclesiastical jurisdiction, and of the operation of the writ of prohibition, has been referred to in a preceding chapter(*a*). The contention was renewed in the reign of James I., by Archbishop Bancroft, who, in 3 Jac. I. A.D. 1608, exhibited to the Privy Council, in the name of the clergy, articles complaining of abuses in granting prohibitions, to which all the judges replied by an answer to the articles *seriatim*(*b*).

According to the modern practice with respect to a writ of prohibition, the party applying for it does so by notice calling on the opposite party interested, and the judge who is sought to be prohibited, to show cause against the prohibition issuing. On this application the prohibition issues, or the applicant is directed to deliver a *declaration*, which states the proceedings in the court below, and prays that the prohibition may issue. To this declaration the opposite party may demur, or traverse the facts stated, or plead new facts to show that the writ ought not to

(*a*) *Ante*, p. 310.

(*b*) 2 Coke's Inst. 601. Repeated instances of collision between the judges and bishops are stated in Coke's 12th Report.

issue; and on these pleadings the judgment of the superior court is founded(*a*).

With respect to delay of justice by the superior courts, it seems to have been the practice of the House of Lords at the period when that House exercised an original as well as an appellate jurisdiction, to receive complaints, and to direct the judges to give redress. Many instances of this kind are mentioned in the controversy between the two Houses of Parliament in 1666, respecting the jurisdiction of the House of Lords. For example, in 14 Edw. III. Sir Jeffry Stanton petitions the King in Parliament, complaining that he could not get the judges of the Common Pleas to proceed to judgment respecting certain lands claimed by him. The Lords thereupon order a writ under the Great Seal to be sent to the judges, willing them, if the matter so stood, to proceed to judgment without delay. They not doing it, an *alias* is sent; and the judges doing nothing then neither, and Sir Jeffry renewing his petition, the Lords send the Clerk of Parliament to the judges to require them to proceed to judgment, or to come into the House with the whole record. The judges came accordingly, and it was adjudged that Sir Jeffry should recover, and a writ under the Great Seal was sent to the judges to give judgment accordingly(*b*). But this species of control over the superior courts has long been discontinued. In 1692, Lord Chief Justice Holt, and another judge of the King's Bench, were called before the House of Lords, and required to give reasons for a judgment of that court, which appeared to contravene a judgment of the House of Lords in a peerage case; the judges refused to give the reasons of their judgment, on the ground that they were not to be arraigned for what they did judicially, and that the proper method of arraigning their judgment was by writ of error(*c*).

(*a*) 3 Blackstone, 112; 1 Will. IV. c. 21, s. 1.

(*b*) Case of Thomas Skinner and the East India Company. (6 State Trials, 751.)

(*c*) 12 State Trials, 1167.

At the present day there is no judicial control over the judgments of the superior courts of law or equity, except by appeal or proceedings in error.

iii. *The Means of preventing powerful Offenders from escaping Justice.*—Many of the early statutes give evidence that the contemporary laws were not effectually enforced against great offenders. The statute of Marleberge, 52 Hen. III. c. 1, recites that great men and others refused to be justified by the King and his Court, and took great revenges and distresses of their neighbours. The statute 4 Edw. III. c. 11, recites that great men and others have made alliances, confederacies, and conspiracies to maintain parties, pleas, and quarrels; whereby divers have been wrongfully disinherited, and some ransomed and destroyed, and some, for fear to be beaten and maimed, durst not sue for their rights; and similar statutes might be cited(*a*).

The House of Lords seems in early times to have frequently interfered to prevent an obstruction of justice by persons having local power, or suspected to have an influence upon the juries. Thus, in 4 Hen. IV., Sir Philip Courtney, a great man in the country, oppresses Pontyngdon, and dispossesses him of his land by force, who thereupon prays the Lords for God's sake, and as a work of charity, they would give remedy in this case. The Lords commit the business to the care of the Archbishop of Canterbury, before whom the parties subsequently agree to go to trial. To prevent undue influence upon the jury, the Lords direct a writ to go to the judges of assize, requiring that none shall be on the jury but such as had £40 a year in land. This, and other like cases, were cited in the controversy between the two Houses of Parliament in Skinner's case(*b*) in 1666, to

(*a*) By 20 Edw. III. c. 1, if any letters, writs, or commandments come to the justices in disturbance of law or right, the justices are to do right without regard to them, and are to certify such illegal commandments to the King and his Council.

(*b*) *Ubi supra.*

Another curious case of original jurisdiction exercised in Parliament

support the jurisdiction which the Lords then claimed to give relief to a poor man oppressed by a rich company, with whom he was no ways able to wage law. "That consideration," said the Lords, "hath in all times prevailed with that House, which is composed of persons of generous spirit, who cannot see poor men oppressed without feeling in their hearts an inclination and desire to relieve them." The House of Commons however denied that the House of Lords had then any other than an appellate jurisdiction, and stoutly resisted their interference with the ordinary course of justice, which the Commons contended that the courts of law were able to administer. The dispute between the two Houses in Skinner's case was terminated in 1669–70, by their agreeing to a proposal of the King, that they should erase in their journals all records of the matter. "This compromise," says Mr. Hargraves, "operated as a blow so fatal to the claim of the Lords to an *original* jurisdiction, that the exercise in *civil* causes has ever since been relinquished"(*a*).

The Court of Chancery at an early period of its history adopted like reasons for interfering with matters of common law jurisdiction. In the reign of Henry IV., in answer to complaints of the Commons against the judicature in Chancery, the King answered that the statutes should be kept, except where one party was so great and rich, and the other so poor, that he could not otherwise have remedy. In the reign of Henry V. bills for assaults, and other matters cognizable at law, were brought in Chancery; the plaintiff making such allegation as "that he was too poor to sue at common law, and that the defendant was strong, and abounding in

is that cited 4 Coke's Inst. 228, in which the Corporation of Cambridge had raised a tumult against the colleges, imprisoned the Vice-Chancellor, and extorted from the scholars two releases and a bond. Upon hearing of this case, it was adjudged by the King (Richard II.), with the consent of the Lords and Commons, that the liberties of the Corporation should be seized, and others granted. It is observable that the Corporation pleaded to the jurisdiction, but the plea was overruled.

(*a*) Hargrave's Preface to Hale's Jurisdiction, cxxvi.

riches." But the Court of Chancery gradually ceased to interfere with matters of common law jurisdiction(*a*).

The Star Chamber also exercised a remedial jurisdiction as a protection against the oppression of powerful men. In the words of Lord Somers, already quoted, its powers were extended in the reign of Henry VII. "to punish great riots, to restrain offenders too big for ordinary justice, or, in the modern phrase, to preserve the public peace." But we have seen that the Star Chamber was perverted into an instrument of political oppression, and that the abuse of its powers led to its abolition in the reign of Charles I.(*b*).

The original jurisdiction of the Star Chamber was probably exercised by delegation from the Privy Council. It is certain that in ancient times the *consilium regis* exercised a very great jurisdiction in cases both civil and criminal; but this power was much abated by statutes of Edward III. and subsequent reigns. Among other causes which tended to diminish the use of this jurisdiction was the substitution of *auditores petitionum*, for transacting business touching petitions in Parliament. Continual complaints were made by the Commons against the judicature of the Council, but it was not wholly discontinued so late as 3 Henry VII.(*c*)

All irregular and exceptional methods of trial are repugnant to the principles of the English Constitution, and this repugnancy is well illustrated by the popular opposition to the interference of the House of Lords, Privy Council, Chancery, and Star Chamber with the ordinary course of judicature, even for the purpose of protecting the weak against the strong. That protection consists, not in the adoption of extraordinary modes of procedure against powerful persons, but in the securities which have been established for the impartiality and independence of judges and others concerned in the administration of justice. With respect to civil

(*a*) 1 Spence's 'Equitable Jurisdiction,' book iv. chap. 1; 1 Kennedy's 'Practice of Chancery,' 7, 8.

(*b*) *Ante*, p. 236.

(*c*) Hale's Jurisdictions, chap. 5.

procedure, there are no differences requiring our attention, between suits against powerful persons and ordinary suits. The methods by which criminal law is liable to be enforced against powerful offenders, present however some peculiar features, which may be here considered with respect to the prosecution of offences,—the trial and judgment,—and the execution of the judgment.

Blackstone says, "All offences are either against the King's peace, or his crown and dignity, and are so laid in every indictment;" and he adds that the King is "the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law"(*a*). It must not be inferred from this statement that crimes have always been regarded by the law merely as offences against the State; at the time when Blackstone wrote, and for many centuries previously, private subjects might prosecute others for heinous crimes by "appeal of felony," which might be brought for crimes committed against the parties themselves, or (in cases of murder or manslaughter) their relatives; and so strictly did the law regard this right of "appeal" as a private right, that a man might be prosecuted by appeal, even where he had been indicted of the same offence and acquitted, or made his peace with the King; and an appellee found guilty on trial of appeal could not be pardoned by the Crown, because the suit was that of a private subject, for the atonement of a private wrong(*b*).

These prosecutions are now abolished, but while they existed were a means of bringing offenders to justice whom the Crown refused to prosecute. Such prosecutions however were doubtless objectionable, on the ground that the prosecutors might compound for crimes for money; and

(*a*) 1 Blackstone, 268.

(*b*) 3 Blackstone, 313, where it is said that this word "appeal" is derived from the French "appeler," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "appeal" in English.

as the Crown could not compel the prosecutors to proceed with the trial, there might be a failure of justice.

It is doubtful whether Blackstone means to assert that the prosecution of crimes ought to belong to the Crown solely; but it would obviously be inexpedient to take from private persons all means whatsoever of instituting prosecutions. Our law has never gone so far as this. The most ordinary way of prosecuting crimes is by indictments preferred by private persons. When any indictment is found by a grand jury, the King is bound to lend the sanction of his name to the prosecution, though a *nolle prosequi* to stay proceedings may be entered by authority of the Attorney-General at any time after the bill of indictment is found, and before judgment(*a*).

The grand jury has also an important constitutional right of *presentment* of offences from their own knowledge and observation, without any bill of indictment laid before them at the suit of the Crown; and upon the presentment the officer of the court must frame an indictment(*b*).

The oath administered to the grand jury commences, "You shall diligently inquire, and true presentment make, of all such articles, matters, and things, as shall be given you in charge, *and of all other matters and things as shall come to your own knowledge* touching this present service." In a celebrated tract, attributed to Lord Somers, it is said, "Grand juries have both a large field for their inquiry, and are in many respects better capacitated to make a strict one than petit juries. These last are confined to the person, and the crime specified in the indictment; but they are obliged to search into the whole matter that anyways concerns every case before them. . . . If the crimes objected are manifest, it is then the grand jury's duty to inquire after all the persons in any ways concerned in them. . . . But the inquisi-

(*a*) Archbold's Criminal Pleading, 91. The Court of Queen's Bench will not interfere with the Attorney-General's discretion in this respect. (Reg. *v.* Allen, 8 Jurist, N. S., 230.)

(*b*) 4 Blackstone, 301.

tions into all these matters, which require all possible strictness in searching, as being of the highest importance unto the public justice and safety, is wholly out of the power and trust of the petit jury. . . . They are bound to move within the circle of the indictment made by the grand jury, who are to appoint and specify the offences for which the accused shall be tried by the petit jury" (*a*).

The grand jury has therefore a power of *commencing* at least a prosecution in cases in which the Crown may be most adverse to the prosecution. The nature of this power is illustrated by the celebrated proceeding of the grand jury of Middlesex in 32 Car. II., A.D. 1680, who, being about to present the King's brother, the Duke of York, as a popish recusant, were abruptly discharged by Lord Chief Justice Scroggs, before they had finished their presentments. The House of Commons resolved, in reference to these proceedings, "That the discharging of a grand jury by any judge before the end of the term, assizes, or sessions, while matters are under their consideration, and not presented, is arbitrary, illegal, destructive to public justice, a manifest violation of his oath, and is a means to subvert the fundamental laws of the kingdom." And the conduct of Scroggs in this respect was the subject of one of the articles of his subsequent impeachment (*b*).

The constitutional power of grand juries here referred to was much considered in the case of the Earl of Macclesfield *v.* Starkey, in 36 Car. II., A.D. 1684. The defendant Starkey was one of a grand jury who had presented Lord Macclesfield as one of the promoters of a "seditious address and routous reception of the Duke of Monmouth." Lord Macclesfield sought to make the defendant liable in damages for this presentment as a malicious libel. The principal question of law in this case was, whether the grand jury acted within the scope of their duty in making their

(*a*) The Security of Englishmen's Lives; or, the Trust, Power, and Duty of Grand Juries, pp. 25, 121–23.

(*b*) 8 State Trials, 163.

presentment; and it was contended that where the grand jury apprehend the peace of the country to be in danger, they ought to present their fears and apprehensions to the courts of justice. The judgment of the court held the defendant not liable to an action on account of statements contained in the presentment(*a*).

Our law provides two peculiar methods of prosecuting powerful criminals,—impeachment and trial by the House of Lords,—of which the general policy, so far as it is pertinent to the subject of this chapter, may be here properly adverted to, though the particular description of those modes of trial will be considered more fully hereafter.

The prosecution of great offenders by impeachment of the House of Commons is referred by Sir W. Blackstone(*b*) to this principle—that "it may happen that a subject entrusted with the administration of public affairs may infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or House of Commons, cannot properly *judge*, because their constituents are the parties injured, and can therefore only *impeach*. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason therefore will suggest that this branch of the legislature which represents the people must bring its charge before the other branch, which consists of the nobility, who have neither the same interests nor the same passions as popular assemblies."

The ancient principle of our law, that a man shall be tried by his peers (*pares*)(*c*), or equals, extends to the case of the

(*a*) 10 State Trials, 324. (*b*) 4 Commentaries, 260.

(*c*) Barrington, in his observations on Magna Charta, says,—"I should therefore conceive that the trial *per pares*, in the twenty-ninth chapter of Magna Charta, was meant chiefly to relate to the trial of the barons by their peers; though it hath, fortunately for the liberties of this country, been expounded to extend to the trial of all persons by a jury." (Observations on the Statutes, third edition, p. 30.)

In the case of Lord Audley, 7 Car. I., A.D. 1631, the judges resolved that

trial of a temporal lord of Parliament by his peers, for treason or felony, or for misprision of either, and is obviously calculated to avoid the prejudice in his favour or against him, that might arise if he were tried by an inferior tribunal. And therefore the trial of a peer for such offence is by the Lords.

A peer who is indicted of misdemeanour only, is tried, not by his peers, but by jury. Upon this Mr. Barrington observes, that it is extraordinary that the peerage (who like other bodies of men are usually very tenacious of their privileges) should not have insisted upon being tried for a misdemeanour by their peers, and not by a common jury, as the prejudices of such a jury are more likely to operate in a misdemeanour than in a capital offence. "Surely," he adds, "the words 'Nullus liber homo *capiatur*, aut imprisonetur, aut *aliquo alio modo* destruatur, nisi per legale judicium parium suorum,' seem to have been anxiously inserted to include every kind of criminal prosecution. It is, indeed, not only a provision in favour of the subject by one of the chapters of Magna Charta, but seems to have been likewise the law of every part of Europe where the feudal policy had been introduced" (*a*).

"Appeals" of various crimes, which, as we have already seen, were prosecutions by private persons, were before the time of Henry IV. frequently prosecuted in Parliament. Such appeals were probably often resorted to as a means of obtaining justice against great offenders; but by 1 Hen. IV. c. 10, it was enacted that no such appeals from thenceforth should be pursued in Parliament.

After this reign the House of Lords rarely interfered in ordinary criminal cases where commoners only were concerned. But this interference was frequently exercised in that reign and the preceding, as in great riots, or where, by

a peer of the realm cannot waive his trial by peers and be tried by a jury; for his trial by his peers is no privilege, but the law, declared by Magna Charta. (3 State Trials, 402.) To the same effect was the decision of the judges in Lord Dacre's case in 26 Hen. VIII. (Kelyng's Reports of divers Cases, in Pleas of the Crown, fol. ed. p. 56.)

(*a*) Barrington, Observations on Statutes, 20 Hen. VI., third edition, p. 368.

the power and outrageous oppression and violence of men in power, the proceeding of the common law was obstructed; and by the interposition of the Lords that obstruction was removed, and suits remitted to their regular course in the ordinary courts of justice. In all cases where the evidence of the fact was not clear by the confession of the parties or great notoriety of the fact, the party complained of might require a trial by jury. And then the complaint was either sent into the King's Bench to be tried, which was the usual course; or special commissions of inquiry issued to try it by inquest; or (which was very rare) it was tried by a jury *coram rege et concilio,* which seems to have been in Parliament(*a*).

We have already seen(*b*) that the laws formerly made a difference between the punishment of peers and commoners for like offences, but that the difference no longer exists. The punishment of peers or other powerful delinquents might however be prevented by the exercise of the Royal prerogative of *pardon.* The maintenance of this prerogative is justified by Blackstone on this ground,—that "it is reasonable that he only who is injured should have the power of forgiving." If no better reason for maintaining the prerogative existed than this inference from the legal hypothesis, that crimes are committed against the King's peace, we may be sure that the prerogative would have long ago been condemned by the common sense of mankind. There are much better reasons for giving to the Crown a power of pardon, but we are not here concerned with them, except so far as relates to the partial and unjust exercise of the power in behalf of persons who procured the Royal favour. That the power was so exercised in former times there is little reason to doubt(*c*). But pardons are now never granted by

(*a*) Hale's Jurisdiction of the Lords' House, chap. 16.

(*b*) See the first division of this Chapter, section iii.

(*c*) *E.g.*, to select a very gross instance, the reprieve of the Earl and Countess of Somerset, by James I., in 1621, and their subsequent pardon, for the murder of Sir Thomas Overbury. (2 State Trials, 951.)

Barrington, in his 'Observations on the Statutes,' referring to Magna

the Crown except upon the advice of its ministers(*a*), and their responsibility to Parliament is an effectual protection against the grant of pardons from motives of favouritism. Moreover, a pardon of an indictable offence cannot be pleaded before indictment(*b*), and therefore will not prevent the publicity of the offence resulting from the finding of the grand jury. By the Act of Settlement, 12 & 13 Will. III. c. 2, it was enacted that no pardon under the Great Seal of England shall be pleadable to an *impeachment* by the Commons in Parliament; but after the impeachment has been heard and determined, the King may pardon.

De Lolme is enthusiastic in his eulogy of the laws relating to the trial of peers, and the execution of law against powerful persons in England. With respect to the trial of persons having the privilege of peerage, by their peers, he observes that "if we cast our eyes either on the collection of State Trials or on the History of England, we shall find very few examples, if any, of a Peer really guilty of the offence laid to his charge, that has derived any advantage from his not being tried by a jury of commoners." De Lolme adds that the "singular situation of the English judges relatively to the three constituent powers of the State (and also the

Charta, c. 34, says, "One of the methods by which, not only the Kings of England, but of other parts of Europe, raised money at this time, was by pardoning crimes for considerable sums of money." Referring to the statutes 2 Edw. III. the same writer says, "The second chapter regulates in what cases pardons shall be granted, to pardon by his oath, *c'est à sçavoir, ou homme tue autre soi defendant, ou en cas fortuit.* On such an accident (for I cannot call it a crime, which always necessarily implies a bad intention in the perpetrator), the King was obliged, says the statute, to grant a pardon by his oath, meaning, undoubtedly, his coronation oath."

In his report of the case of Bigby *v.* Kennedy, A.D. 1770, Sir W. Blackstone says, "It was indeed a most foul murder; but through the intercession of their sister, who was intimately connected with some persons of quality, a conditional pardon for transportation was obtained for Matthew, who struck the stroke." (2 Blackstone's Reports, 715.) He adds, that proceedings were taken "by a set of persons who were in violent opposition to the government, to raise odium and popular clamour on account of so *unadvised* a pardon."

(*a*) See *infra*, Book III. Ch. VI.

(*b*) 1 Chitty, Crim. Law, 764.

formidable support which they are certain to receive from them as long as they continue to be the faithful ministers of justice) has at last created such an impartiality in the distribution of public justice in England, has introduced into the courts of law the practice of such a thorough disregard to either the influence or wealth of the contending parties, and procured to every individual both such an easy access to those courts and such a certainty of redress, as are not to be paralleled in any other government"(a).

(a) De Lolme on the Constitution of England, book ii., ch. 16.

CHAPTER VI.

THE JUDICATURE OF PARLIAMENT AND OF THE LORDS.

EVERY proceeding in the House of Peers acting in its judicial capacity, whether upon writ of error, impeachment, or indictment removed thither by *certiorari*, is, says Mr. Justice Foster, in the judgment of law, a proceeding before the King in Parliament; and therefore in all those cases the House is called the Court of our lord the King in Parliament. This court is founded upon immemorial usage, upon the law and custom of Parliament, and is part of the original system of our Constitution. It is open for all the purposes of judicature during the continuance of the Parliament; it opens at the beginning and shuts at the end of every session (*a*).

Judicature (*b*) *in* Parliament is now confined to these cases:—Proceedings upon bill of attainder, or of pains and and penalties;—trial upon impeachment by the House of Commons;—trial of Peers indicted;—and appellate jurisdiction. Besides this judicature in Parliament, the Lords are authorized by law to sit in the Court of the Lord High Steward upon trials of Peers when Parliament is not sitting.

1. The High Court of Parliament is the supreme court

(*a*) 19 State Trials, 961.

(*b*) There are *committees* of Parliament which exercise functions of a judicial character, but the resolutions of these committees have not the authority of final judgments. Such committees are those on various private bills (*ante*, p. 170), and Committees of Privileges (*ante*, p. 72).

in the kingdom for the punishment of great offenders, whether Lords or Commoners, either by proceedings upon bills of attainder, or of pains and penalties, or by the method of Parliamentary impeachment by the House of Commons.

The punishment of offences by *bills of attainder*, and the analogous method of *bills of pains and penalties*, passed by Parliament, was very rare until the reign of Edward IV., and was confined to cases in which, by the absence of the offender, it was impossible to bring him to regular trial(*a*). In the reign of Edward IV., A.D. 1461–83, many persons who had taken part in the civil wars between the Houses of York and Lancaster were attainted by Acts of Parliament. In the commencement of the reign of Henry VII., an Act of Attainder of several persons who had taken part with Richard III. was passed, and several other Acts of Attainder on account of treasonable attempts against the King were passed(*b*). In the reign of Henry VIII. the application of this method of punishing state offenders received a terrible extension. Hitherto, there had been no instance of an accused person who was forthcoming being condemned without trial; and even where the offenders had fled, there was, in the earliest cases, a strong reluctance to condemn them in their absence(*c*). But Henry VIII., in 1539, put a question to the judges with respect to certain attainders and executions which met with great opposition in Parliament, "whether a man that was forthcoming might be attainted of high treason by Parliament, and never called to his answer?" The judges answered "that it was a dangerous question; and that the High Court of Parliament ought to give examples to inferior courts for proceedings according to justice; and that no inferior court *could* do the like, and they thought the High Court of Parliament *would* never do it." But being, by express com-

(*a*) See *ante*, p. 227, the cases of the Despencers, and of Michael de la Pole, p. 229.

(*b*) 4 Hatsell, 73.

(*c*) See *ante*, p. 227, case of the Despencers.

mandment of the King, pressed to give a direct answer, they said, "That if he be attainted by Parliament, it could not come in question afterwards whether he were called or not called to answer"(*a*). Burnet, in his History of the Reformation, speaking of these occurrences in 1539, says, that in the Parliament of that year, persons were for the first time attainted who were in custody and yet not brought to trial. "Sixteen persons were in this manner attainted, and if there was any examination of witnesses for convicting them, it was either in the Star Chamber or before the Privy Council, for there is no mention of any evidence that was brought in the journals" (sc. of Parliament)(*b*). Sir Edward Coke thus speaks of the Act of Attainder of Lord Cromwell in the following year: "Albeit I find an attainder by Parliament of a subject for high treason being committed to the Tower and forthcoming to be heard, and yet never called to answer in either House of Parliament, (although I question not the power of Parliament, for without question the attainder is of force in law,) yet this I say of the manner of proceeding, *Auferat oblivio si potest; si non, utcumque silentium tegat*"(*c*).

Upon the attainder of Lord Seymour in similar circumstances, in 2 Edw. VI., A.D. 1549, Burnet says that the Peers easily agreed to it, for they had been accustomed to agree to such bills in King Henry's time. The Bill was sent to the Commons, with a message, that if they desired to proceed as the Lords had done, those Lords that had given their evidence in their own House should come down and declare it to the Commons. But the attainder was opposed in the House of Commons. Many argued against attainders in absence, and pressed that Seymour should be heard to plead for himself. However, in this case the procedure was more regular than in former attainders, for the evidence was given before both Houses(*d*).

(*a*) Coke, 4 Inst. ch. 1.
(*b*) Hist. of Reformation, part i. bk. 3 (8vo. Oxford, 1816, vol. i. p. 653).
(*c*) 4 Inst., *ubi supra*.
(*d*) Hist. of the Reformation, part ii. book 1, *ibid.* vol. ii. pp. 184, 185.

When the Duke of Somerset was tried for treason and felony, in 5 Edw. VI., before his peers, he was proceeded against upon written depositions, and found guilty of the felony. This occasioned the proviso to be inserted in the "Act for the Punishment of divers kinds of Treasons," 5 & 6 Edw. VI. c. 11, by which no person may be indicted, arraigned, or attainted for any of the treasons mentioned in the statute, or any other treasons, but upon confession, or the testimony of two lawful accusers, who, if living, shall, at the time of the arraignment, be brought before the person accused(*a*). In the year in which this Act was passed, 1552, when the Bill for attainting the Bishop of Duresme was carried down to the Commons with the evidences against him, which were some depositions that had been taken and brought to the Lords, they, who were resolved to condemn that practice for the future, refused to proceed with the Bill(*b*).

The procedure on bills of attainder has varied considerably in later cases. In Lord Strafford's case, A.D. 1640, the Commons in the first place proceeded by way of impeachment, exhibiting articles and producing proofs in support of them. But before the Lords gave judgment the Commons abandoned the impeachment, and passed a bill of attainder, which was subsequently reluctantly passed by the Lords(*c*). In the case of Sir John Fenwick, A.D. 1696(*d*),

(*a*) Burnet says, "This proviso seems clearly to have been made with relation to the proceedings against the Duke of Somerset, in which the witnesses were not brought to aver the evidence to his face; and by that means he was deprived of all the benefit and advantage which he might have had by cross-examining them." (Hist. of the Reformation, part ii. book 1. *Ibid.* vol. ii. p. 353.)

(*b*) Burnet, *ibid.* p. 361.

(*c*) 3 State Trials, 1381. The Act for reversing Lord Strafford's attainder (13 & 14 Car. II. c. 29) recites that the purpose of the Act of Attainder was to condemn the Earl "upon accumulative treason, none of the pretended crimes being treason apart, and so could not be in the whole." The reversing Act describes various circumstances of violence and intimidation which accompanied the passing of the Act of Attainder.

(*d*) 15 State Trials, 537.

evidence in support of the bill was adduced by the counsel for the attainder, and Fenwick was allowed to make his full defence by counsel, who cross-examined witnesses, argued various questions of evidence, and addressed the House on the case generally. The occasion of the attainder of Sir John Fenwick was, the absconding of an important witness who had given evidence of Fenwick's treason before the grand jury, by whom an indictment against him had been found. The Bill went through the regular stages of passing each House, and receiving the royal assent.

2. Of the origin of the method of *impeachments* we have already spoken, with reference to the responsibility of the advisers of the Crown to Parliament, and the constitutional importance of this method has been adverted to in the preceding chapter. To which may be added the following view of the constitutional effect of impeachments:—"The advantage which impeachments afford as a check and terror to bad ministers is so obvious and so great, that it almost solely engrosses the attention, and is considered as the principal if not the only recommendation of that mode of prosecution. But there is an additional reason why it ought to be cherished by Englishmen, which is, that it furnishes the most effectual preservative against the corrupt administration of justice; and it ought, perhaps, upon experience to be dearer to us upon this ground than upon any other, as it has been employed with less admixture of vindictive or unwarrantable motives, when directed to this object, than when its terrors have been levelled against favourites and ministers. That ministers are not now violating the principles of the Constitution, or that the administration of justice is now free from the slightest stain or suspicion of corruption, furnishes no reason for abolishing this mode of trial; for it is impossible to know how much of the security with which we now enjoy our Constitution and liberties, and how much of the satisfaction with which we confide in those unsuspected characters that now grace the

seats of justice, may be derived from the existence of this very institution; the benefit of which, since prevention is more desirable than punishment, cannot be more conclusively proved by any means than by the few occasions there have been of late for exerting it"(a).

With respect to the method and objects of impeachments, we may consider—who may be impeached; the proceedings before trial; the proceedings on and after the trial.

With respect to the persons who may be impeached, Blackstone says, that a commoner cannot be impeached for any capital offence, but only for high misdemeanour; but a peer may be impeached for any crime, though for misdemeanours, as libels, riots, etc., peers are to be tried, like commoners, by a jury(b). This position of Blackstone, that a commoner cannot be impeached of any capital offence, has been seriously controverted; and the resolution of the House of Lords, in 1689, after much consideration of precedents to proceed on the impeachments of Blair and other commoners for high treason, is conclusive against the opinion of Blackstone, which he supports by no precedent later than the reign of Edward III.(c). Sir William Jones remarks that if commoners could not be impeached of high treason, it would be in the power of the Crown, "by making only commoners ministers of state, to subvert the government by their contrivances when they pleased. Their greatness would keep them out of the reach of ordinary courts of justice, or their treasons might not perhaps be

(a) From 'A Review of the Arguments in favour of the Continuance of Impeachments, notwithstanding a Dissolution,' published in 1791; and cited 4 Hatsell's Precedents, 77, where it is attributed to Spencer Perceval, afterwards Chancellor of the Exchequer.

The latest instance of a Parliamentary impeachment at the bar of the House of Lords was that of Lord Melville, in 1805, for misapplication of public money. (29 State Trials, 509.) In 1816, Lord Cochrane presented in the House of Commons articles of impeachment against Lord Chief Justice Ellenborough, but the House refused to proceed with them. (4 Hatsell, 264.)

(b) 4 Blackstone, 259.

(c) 4 Hatsell's Precedents, 61 *n.*, 252.

within the statute, but such as fall under the cognizance of no other court than the Parliament"(*a*).

There is some difficulty in understanding what treasons are here referred to. The Statute of Treasons, 25 Edw. III. c. 2, after defining what offences shall be treason, adds that other cases of supposed treason shall not be judged by the justices to be treason, "till the cause be showed and declared before the King and his Parliament whether it ought to be judged treason or other felony." But this proviso left the law of treason, which ought to be clear and precise, in a great degree vague; and the subsequent statute 1 Hen. IV. c. 10, referring to the uncertain state of the law of treason in the preceding reign, enacts that no treason be judged otherwise than was ordained by the statute of Edward III. It has been cogently argued(*b*) that the enactment of 1 Hen. IV. repealed the proviso in question; and Sir Matthew Hale(*c*) says that by the proviso the decision of *casus omitti* is reserved to the King and Parliament, "and the most regular and ordinary way is to do it by a bill declaratively." It may be safely assumed that at the present day no man could be convicted of treason, either on impeachment or in a court of law, except under the authority of existing laws, or an Act of Parliament.

The proceedings on an impeachment before trial consist principally in the oral delivery of the charge of impeachment at the bar of the House of Lords by a member of the House of Commons, who, by their command, impeaches the persons named of the crimes and misdemeanours charged against them, and the written statements in the nature of *pleadings*. These consist in the first place of *articles* of

(*a*) 'A Just and Modest Vindication of the Proceedings of the Two Last Parliaments,' by Sir William Jones, quarto, 1681. This work is reprinted in the 'History and Proceedings of the House of Lords, from the Restoration in 1660 to the Present Time,' 8vo, 1742, vol. i., see p. 296.

(*b*) Argument of Mr. Lane on the trial of the Earl of Strafford, 3 State Trials, 1475.

(*c*) Hale's Pleas of the Crown, part i. ch. 24; see to the same effect Hale's Jurisdiction of the Lords, ch. 16, where instances are cited.

impeachment prepared by the direction of the Commons, and delivered to the Lords. The person impeached has usually been allowed a fixed time to put in his *answer* to these articles. The answer replies to the articles severally; but in some cases instead of an answer the person impeached has put in a *plea* in bar of the impeachment, for instance, a plea of pardon. The answer or plea is delivered to the Lords, and by them communicated to the Commons. The Commons may in the former case deliver their *replication* to the answer, briefly averring their charges to be true, and declaring their readiness to prove them(*a*); but where the person impeached puts in a plea instead of answering, it seems that the House of Commons may demur to the plea instead of putting in replication(*b*).

For the prosecution of the trial *managers* are appointed by the House of Commons, if the persons impeached do not plead guilty; but if they so plead, the course appears to be not to appoint managers until the persons impeached are about to receive judgment(*c*). A Lord High Steward supplies the place of the usual Speaker of the House of Lords on impeachments for high treason, but not (it seems) in cases of misdemeanour(*d*). The High Steward is Speaker *pro tempore* appointed by the Crown upon address of the Lords, and he gives his voice as any other Lord; but in 1679, on the impeachment of the "five popish lords," the House of Lords resolved that they had power to proceed to trial, though the King should not name a High Steward(*e*). The House of Commons attend the trial as a Committee of the whole House(*f*). The managers open their case and

(*a*) See replication on impeachment of the Earl of Strafford, 1715. 15 State Trials, 1044.

(*b*) Thus, on Lord Danby's impeachment, in 1678, he pleaded a pardon; and the Speaker of the House of Commons, at the bar of the House of Lords, demurred that the plea was illegal and void. (11 State Trials, 790.)

On the impeachment of Goudet and others, in 1698, they put in pleas at the bar of the House of Lords, but were afterwards allowed to withdraw them and put in answers, to which the Commons put in replication. (4 Hatsell, 278.)

(*c*) 4 Hatsell, 318.

(*d*) *Ibid.* 200 *n.*

(*e*) 4 Hatsell, 206.

(*f*) *Ibid.* 298.

adduce evidence. The counsel for the accused person address the Lords, and adduce evidence for the defence, and the Commons have the right of reply(*a*). The Lord High Steward (or the Speaker of the House of Lords in cases in which a Lord High Steward is not appointed) puts the question to the Lords one by one, whether the person impeached is guilty or not of the several articles of the impeachment, and the question is decided by the majority of voices. If the person accused be found guilty, the Lords proceed to determine what judgment shall be given. It is observable that upon impeachments, as well as upon trials of indicted Peers in Parliament, the Lords combine the functions of judge and jury; and in this respect trials in Parliament resemble the ancient *judicium parium*, recognized by Magna Charta, far more completely than trial by jury does.

The Lords do not proceed to judgment of persons impeached by the Commons until judgment be first demanded by the Commons(*b*). We have already stated that an impeachment is not put an end to by the prorogation or dissolution of Parliament, and that a pardon cannot be pleaded in bar of an impeachment(*c*).

3. *Trial of Peers indicted.*—If a Peer be indicted of a capital offence or felony(*d*) when Parliament is sitting, the indictment is removed by *certiorari* to be tried in the House of Lords. The trial by peers is, as we have seen, recognized by Magna Charta, and is probably even more ancient. The

(*a*) See, as to the right of the Commons to reply, trial of Dr. Sacheverell (eighth day). (15 State Trials, 364.)

(*b*) 4 Hatsell, 319. (*c*) *Ante*, Book II. Ch. V., last paragraph but one.

(*d*) Blackstone says the indictments removable by *certiorari* into the Court of the Lord High Steward are—treason, felony, or misprision of either. (4 Comm., 261.)

Hale, Jurisdiction of the Lords, ch. 16, says the only known instance of the trial of a Peer otherwise than by his peers is that of Thomas de Barclay, who, in 4 Edw. III., was tried for his part in the death of Edward II. by a jury of knights and esquires, at the bar of the House of Lords. Hatsell, however, thinks Hale's statement erroneous, and points out that the record designates Thomas de Berkeley *Miles*. (4 Precedents, 81 *n.*)

trial of Peers in Parliament is by the whole House. A Lord High Steward is appointed, who acts as Speaker *pro tempore*, and votes with the rest of the Lords in right of his peerage; but the collective body of Peers are judges both of the law and facts of the case tried(*a*). The resemblance of this jurisdiction to the ancient *judicium parium*, on which it is obviously founded, has been already pointed out.

4. *The Court of the Lord High Steward.*—When a Peer is indicted of treason or felony, or misprision of either, the indictment is removable by *certiorari* into the Court of the Lord High Steward if Parliament be prorogued(*b*), or if there be no Parliament. The High Steward's Court is an ancient court of judicature instituted by commission from the Crown, in the nature of a commission of *oyer et terminer*. In this Court, the Lord High Steward is the sole judge on points of law and practice, and the Peers summoned are *triers* and judges of fact only(*c*).

Formerly it was the custom to summon only a limited number of Peers to this court. This practice gave a monstrous power to the officers of the Crown, by enabling them to select such Peers only as the predominant party most approved of. Thus, when the Earl of Clarendon fell into disgrace with Charles II., there was a design to try him by a select number of Peers, it being doubted whether the whole House could be induced to fall in with the views of the Court. Thus also, on the trial of Lord Delamere, in 1 James II., A.D. 1686, many of the triers were devoted to the Court; and their selection was, at the Parliamentary Conferences of 1691, attributed to unfair

(*a*) Foster's Report of Lord Ferrers's Case; 19 State Trials, 960, where a full account of the nature of trials of Peers is given; 4 Blackstone, 263.

(*b*) Lord Delamere's case. (11 State Trials, 509.)

(*c*) 4 Blackstone, 263; 4 Hatsell, 299 *n*.

In the conferences between the two Houses of Parliament, in 1691, respecting trials of treason, it was said that the trial in this court originated in the reign of Henry VIII., when it was instituted to take off those he did not like; and the case of the Duke of Buckingham is instanced. (4 Hatsell, 370.)

motives. But now, by 7 and 8 Will. III. c. 3, upon all trials of Peers for treason or misprision, all Peers who have a right to sit and vote in Parliament shall be summoned to appear and vote therein (*a*).

4. *Appellate Jurisdiction.*—The House of Lords is the supreme court of judicature to rectify, upon appeals and proceedings in "error," any injustice or mistake of the law committed in subordinate courts. We have seen (*b*) that the House of Lords formerly exercised a general jurisdiction, original as well as appellate, and that the original jurisdiction has been relinquished, except in the cases referred to in the preceding part of this chapter. Blackstone explains the existence of the appellate jurisdiction of the House of Lords in the following manner. He says that the Lords succeeded to this jurisdiction on the dissolution of the *aula regia* (*c*); "for, as the barons of Parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside, it followed that the right of receiving appeals, and of superintending all other jurisdictions, still remained in the residue of that noble assembly from which every other great court was derived" (*d*). This opinion of Blackstone does not accord with that of Sir Matthew Hale, who, from many ancient authorities, infers that the House of Lords never had, independently of the Crown, any inherent jurisdiction in judicial matters. In reference to this subject, it

(*a*) 4 Blackstone, 263; 4 Hatsell, 299 *n.*, 372; Foster's Report in Ferrers's case, *ubi supra*. On the trial of the Earl of Cardigan, in 1841, for an attempt to murder (the last instance of the trial of a peer by the Lords), Lord Chief Justice Denman, a Peer of Parliament, was appointed Lord High Steward, (4 Stewart's Blackstone, 341 *n.*)

In a note to the edition of Hatsell's Precedents published in 1818 (vol. iv. p. 300), it is stated that no court of the Lord High Steward has ever been constituted since the Revolution. But there have been several trials of indicted Peers *in* Parliament since that time.

(*b*) *Ante*, p. 458. (*c*) *Ante*, p. 302.

(*d*) 3 Commentaries, 57.

will be convenient to premise that at the time when Hale wrote the appellate jurisdiction was exercised principally upon *writs of error* from the subordinate English courts of law, and *appeals* from the English Court of Chancery.

The appellate jurisdiction of the House of Lords with respect to the former—common law judgments examined upon writs of error—was formerly delegated by the Crown in each particular case. There were two methods by which a record might be removed into Parliament for error. The more ancient method was by petition to the King, or to the King and his Council, or the King and Parliament, and indorsement thereon, which authorized the procedure in Parliament; the later method was by writ granted on petition to the Crown. The writ, Hale says, was anciently *per regem* or *per warrantum domini regis;* but in the Long Parliament, by reason of the King's absence, the writ was indorsed by warrant of the Attorney-General, and that practice was continued after the Restoration(*a*). The writ was returnable in Parliament, in order (according to the ancient form of the writ) that justice might be done by the Crown by the advice of the Lords Spiritual and Temporal, and the Commons(*b*).

The second branch of the jurisdiction of the Lords just mentioned—that of appeals from the Court of Chancery—was obtained, it is now agreed, by usurpation in the seventeenth century. Previously, the regular appeal from the Court of Chancery was by a petition to the King, praying a rehearing before him, or commissioners appointed by him; or decrees might be set aside by Act of Parliament.

(*a*) Hale's Jurisdiction, ch. 23, 25.

(*b*) "Ut, de consilio et advisamento Dominorum spiritualium et temporalium, ac communitatum in Parliamento nostro existentium, ulterius pro errore corrigendo fieri faciamus quod de jure," etc.

In the conferences in the case of Ashby *v.* White, in 1704, the Commons complained that the form of the writ had been altered, by omitting the reference to the Commons. (3 Hatsell, 366.)

In the reigns of Edw. I., Edw. II., and Edw. III. petitions and writs of error were determined sometimes *in pleno Parliamento*, but frequently by the Lords only. (Hale's Jurisdiction, ch. 23.)

In the case(*a*) of a petition to the House of Lords, in 1624, against a decree in Chancery, the Lords prayed the Crown for a commission to certain Lords to determine the cause. The first direct judgments of the Lords upon appeal from Chancery without any authority delegated from the Crown, appear to have been in the Long Parliament begun in 1640(*b*).

The appellate jurisdiction of the House of Lords was the subject of vehement dispute between the two Houses in the case of Shirley and Fagg, 27 Car. II., A.D. 1675. The Commons at first merely contested the right of prosecuting suits against members of their House; but at a subsequent stage of the dispute resolved, "that whosoever shall solicit, plead, or prosecute any appeal against any commoner of England, from any court of equity, before the House of Lords, shall be deemed and taken a betrayer of the rights and liberties of the commons of England"(*c*). The dispute between the two Houses was stopped by a long prorogation. When the next session commenced, the Lords heard appeals without any further interruption from the Commons, whose change of conduct is attributed by Mr. Hargraves to a fear lest the wresting the appellant judicature from the hands of the Lords should too much augment the power of the Crown; since the consequence of an abandonment of the Lords' jurisdiction would have been a return to the jurisdiction of commissioners appointed by the Crown(*d*).

Since that time the jurisdiction of the House of Lords in equity appeals has been uninterrupted. Nearly at the same time the House of Lords rejected the judicature of ecclesiastical causes. In 1678, notwithstanding the opposition of Lord Shaftesbury, who contended that the authority of the House as a Court of Review rested upon a principle of universal superintendency, reaching all courts in the kingdom, —civil, criminal, and ecclesiastical,—the House finally re-

(*a*) Matthews's case, Hale's Jurisdiction, ch. 33.
(*b*) Hale's Jurisdiction, ch. 32. (*c*) 6 State Trials, 1183.
(*d*) Hargave's Preface to Hale's Jurisdiction of the Lords' House, p. clxiii.

solved not to receive appeals involving questions of ecclesiastical jurisdiction (*a*).

The appellate jurisdiction of the Lords in English causes has remained substantially unaltered from that time; but two important additions have been made to the Lords' jurisdiction, viz. of Scotch and Irish appeals.

Appeals from the Scotch courts to the House of Lords were not presented until after the union of England and Scotland. The Articles of Union, and the statutes passed in pursuance thereof, contain, strange to say, no provision for such appeals. It appears however that this omission was not by oversight, and that it was assumed that, as the British Parliament came in the place of the Scotch Parliament, the appellate jurisdiction exercised by the latter would, by implication, be transferred to the former. At the time of the Union there was an undoubted right of appeal for "remeid of law" to the King and Parliament of Scotland against sentences of the Court of Session there (*b*).

The right of review of proceedings of Irish courts of justice was, in 1698, the subject of contest between the English and Irish Houses of Lords. In 1783, an appellate jurisdiction was granted (or perhaps restored) to the Irish House of Lords by an Act of the British Parliament; but it was afterwards transferred by the treaty of Union to the Parliament of Great Britain and Ireland, and is now vested in the British House of Lords (*c*).

We shall now proceed to refer to cases in which, and the manner in which, the appellate jurisdiction of the House of Lords is exercised.

The most common exercise of this jurisdiction is in ap-

(*a*) Macqueen, Appellate Jurisdiction, 91.

(*b*) Macqueen, 286, note; 288, 290.

(*c*) Macqueen, 92. By 6 Geo. III. c. 5, it was declared that the House of Lords of Ireland had no jurisdiction of appeals from any court of that kingdom. In a case previous to this statute, "The Governor of Ulster *v.* Bishop of Derry," the English House of Lords held that the appeals from the Chancery of Ireland was properly to them, and not to the Irish House of Lords. (Sir Bartholomew Shower's Reports in Parliament, p. 78.)

peals from the Courts of Equity of England and Ireland; but it is not every decree of these courts which can be made the subject of appeal. Appeals from orders made on petition by the Lord Chancellor in his jurisdiction, for the custody of idiots and lunatics, lie not to the House of Lords, but to the King in Council, because the custody of lunatics is a part of the King's prerogative(*a*).

Rehearings of decrees and orders of the Master of the Rolls, and the Vice-Chancellors of the English Court of Chancery, are usually before the Court of Appeal in Chancery, and thence an appeal lies to the House of Lords; or where application has not been made in due time for rehearing by the Court of Appeal in Chancery, a decree made by the Vice-Chancellor or Master of the Rolls, may be carried by direct appeal to the House of Lords.

It was anciently the practice to examine witnesses upon hearing of appeals; but now the principle universally prevails that no evidence can be received which was not laid before the court below. Where however new evidence has been discovered since the decree appealed from was made, the House has sometimes been induced to remit the cause to the court below, to be reheard on the new evidence.

Previously to the hearing of the appeal, the appellants and respondents have each to present to the House a *printed case*, containing the statements and reasons on which they rely for supporting and opposing the appeal respectively; and the printed case must also contain so much of the proofs taken in the court below as the parties intend to rely on. These printed cases are to be considered as judicial representations, as much as the speeches of counsel at the Bar(*b*).

(*a*) Macqueen, 99, 752.

By 15 & 16 Vict. c. 87, s. 15, the jurisdiction given by various Acts of Parliament to the Lord Chancellor with respect to lunatics, may be exercised by any persons intrusted, under the Royal sign manual, with the custody of lunatics. This jurisdiction is now exercised by the Lords Justices of the Court of Appeal in Chancery, as well as by the Lord Chancellor.

(*b*) Macqueen, ch. 14.

Another branch of the appellate jurisdiction of the House of Lords is the review of judgments in Common Law Courts by proceedings in "error." Error lies from the inferior courts of record in England into the Queen's Bench, and thence into the Exchequer Chamber, and thence into the House of Lords. Error, either in civil or criminal cases, lies only upon matter of *law* arising upon the face of the proceedings, so that no new evidence is required to substantiate or support it; there being no method of reversing an error of *fact* in a verdict, but by a new trial, to correct the former verdict (*a*).

In criminal cases error lies from all the inferior criminal jurisdictions, which proceed according to the course of common law, to the Queen's Bench, and thence to the Exchequer Chamber, and finally to the House of Lords, for every *substantial defect* appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment (*b*).

This however is not the only course of criminal appeal. If a question of law has been raised by demurrer, this course of proceeding in error is the only remedy; but a large part of the questions of law arising in criminal cases may be brought for *final* determination before the "Court for Crown Cases Reserved," hereafter described.

Formerly all proceedings in error were by *writ* of error issued out of the "Petty Bag" (a department of the Chancery, of which the principal business is the issue of various writs), and directed to the judge of the inferior court, requiring him to bring the record in which error is alleged, into the Court of Review. In the reign of Queen Anne, in 1704, it was decided that in all cases under treason and

(*a*) 3 Blackstone, ch. 26. There may, however, in some cases, be proceedings in error to correct error arising out of some fact not *appearing on the record;* as where a party is under some disability, as infancy or coverture, which does not appear by the record. (See Com. Law Proc. Act, 1852, s. 158.)

(*b*) Archbold, Pleading in Criminal Cases, 161; 4 Blackstone, 391.

felony, a writ of error was not merely of grace, but ought to be granted(*a*). In cases of treason and felony it still remains in strict law grantable only *ex gratiâ regis*. In misdemeanours also the writ did not issue as a matter of course, though the Attorney-General ought not to refuse it whenever probable grounds are laid. The Court of Queen's Bench will not however interfere with the exercise of his discretion in that respect(*b*).

The Common Law Procedure Act, 1852, provides (s. 148) that a *writ* of error shall not be used "in any cause," and substitutes a memorandum to be filed by the proper officer.

All judgments of the Exchequer Chamber of England, and the Exchequer Chamber of Ireland, are subject to review on proceedings in error in the House of Lords. By 11 Geo. IV. and 1 Will. IV. c. 70, which regulates proceedings on error from the English Courts of Queen's Bench, Common Pleas, and Exchequer, "writs of error, upon any judgment given by any of the said courts"(*c*), are returnable in the Exchequer Chamber, and from the judgment in error of that court writs of error are returnable in the High Court of Parliament.

By 20 & 21 Vict. c. 77, s. 39, with respect to the English Court of Probate, "any person considering himself aggrieved by any final or interlocutory decree or order of the Court of Probate, may appeal therefrom to the House of Lords." The same provision is made with respect to the Irish Court of Probate, by 20 & 21 Vict. c. 79, s. 45.

The last branch of the appellate judicature of the House of Lords which we shall here consider, is that of Scotch ap-

(*a*) See *ante*, pp. 86, 87.

(*b*) Reg. *v.* Newton, 24 Law Journal, Q. B., p. 246.

(*c*) Upon these words it has been decided that "error in fact" will not lie from the Common Pleas to the Exchequer Chamber, but to the King's Bench. (See, as to what is "error in fact," note at the end of Chapter IX. of this Book.)

From all judgments of the Courts of Queen's Bench in England or Ireland, not intermediately receivable by the Courts of Exchequer Chamber of England and Ireland, error lies to Parliament. (Macqueen, Appellate Jurisdiction, 362.)

peals. These are chiefly from the Court of Session in Scotland, and are now regulated by several statutes. By an Act of 1808, 48 Geo. III. c. 151, "such appeals shall be allowed only from judgments or decrees on the whole merits of the cause," except in certain cases in which appeals may also be had from interlocutory judgments pronounced by Lords Ordinary of the Court of Session, and subsequently reviewed by the decision of that court to which such Lords Ordinary belong.

In 1815 (as we have seen) (*a*), an Act was passed, giving, for the first time, to Scotland the important remedy of trial by jury in civil causes. By that Act the decisions of the Scotch Courts as to granting or refusing trials by jury are not subject to appeal to the House of Lords; but as to exceptions to directions of a judge to a jury, and as to matters of *law* applicable to or arising out of a verdict, such an appeal is provided (*b*).

With respect to the manner in which the appellate judicature of the House of Lords is exercised, it is to be observed that the House sitting upon appeals varies its character according to the place from which the appeal comes: if from a court of law, the House pronounces judgment as a court of law; if from a court of equity, the House pronounces the decree which the court below ought to have pronounced. In Scotch and Irish appeals the House acts upon its own knowledge of the law, both of Scotland or Ireland and England (*c*).

The House of Lords has now virtually delegated its power as a court of appeal to the "law lords,"—that is, those lords who hold or have held high judicial offices. This practice has been adhered to in the present and preceding century, with the exception of a very few cases in which the lay lords voted upon appeals, and is now settled as a general rule, by the case of O'Connell *v.* The Queen; in which, upon the question being put whether the judgment of the court be-

(*a*) *Ante*, Book II. Ch. III. (*b*) Macqueen, 310.
(*c*) Sugden, Law as administered by the House of Lords, 11.

low should be reversed, certain lay lords expressed an intention of voting, but ultimately, on the recommendation of the law lords, withdrew(*a*).

In the exercise of its appellate jurisdiction, as well as of its original jurisdiction, referred to in the former part of this chapter, it is the practice of the House of Lords to refer, in dubious cases, to the opinions of the judges who, as we have seen, are summoned to every Parliament by writ; but the House merely consults the judges, and is not bound by their advice(*b*).

Appeal sittings are usually presided over by the ordinary Speaker of the House—the Lord Chancellor, whose duty it is to hear the arguments throughout; but it has been a matter of complaint that the same duty is not obligatory on other law lords(*c*).

If the Lord Chancellor be prevented from attending, ordinarily a Deputy-Speaker is appointed by the Crown. It is usual, but not absolutely necessary, that the person officiating as Speaker be a peer. Where, as in the instance of Lord Keeper Henley, before he was made Lord Chancellor and created a peer, the Great Seal is confided to a commoner as Lord Keeper, his position is an anomalous one; he can only put the question from the woolsack, and cannot speak. Henley frequently complained that he had to move the reversal of his own decrees, without being permitted to utter a word in their defence(*d*).

Upon appeal sittings, as well as other sittings of the

(*a*) O'Connell *v.* The Queen; 11 Clark and Finnelly's Reports, 425, and note, *ibid.*

The following quotation serves to show what was the practice of the House of Lords in this respect about the year 1770. Referring to the celebrated Duglas cause, Dr. Alexander Carlyle, in his autobiography (8vo, Edinburgh, 1860), p. 513, says, "I had asked the Duke of B., some days before the decision, how it would go; he said that if the law lords disagreed there was no saying how it would go, because the Peers, however imperfectly prepared to judge, would follow the judge they most respected; but if they united, the case would be determined by their opinion, it being the practice in their House to support the law lords in all judicial causes."

(*b*) *Ante*, p. 91. (*c*) Sugden's Law, etc., 33–5. (*d*) *Ibid.* 38.

House, three Peers must be present; but in this respect there is no distinction between law lords and lay lords, who are usually required to attend in rotation, their attendance being requested by letters from the Speaker(*a*).

The constitution of the judicature of the House of Lords has been a frequent subject of complaint and proposals of amendment. One of the grounds of complaint is, that as the Lord Chancellor is the only Peer whose attendance upon appeals is obligatory, there is much uncertainty and irregularity as to the attendance of other law lords; so that where there is no law lord present except the Lord Chancellor, it may happen that, in the House of Lords, he merely hears an appeal from his own decision. This defect of the constitution of the supreme court of judicature is less sensibly felt now than formerly, when the number of law lords was smaller than at present. Lord Eldon suggested that the pensions of ex-Chancellors should be made dependent on their acting as law lords on appeals(*b*). In 1856 it was attempted to remedy the defective constitution of the judicature of the House of Lords, by the creation of peerages for life, but that this creation was (as we have seen) effectually resisted by the House(*c*). It is the opinion of Lord St. Leonards, that the decisions of the House of Lords are not characterized by that perfect uniformity which is necessary for the fixation of the law; and he observes that "no court of appeal will act to the satisfaction of reasonable men, unless it is composed, as long as circumstances will permit, of the same persons, whose express duty it is to hear the appeals, and who are responsible for the decisions; nor unless they are presided over by an accomplished lawyer, to whom the profession and the suitors may look up with confidence"(*d*).

(*a*) Macqueen, 31. (*b*) Sugden, 36. (*c*) *Ante*, p. 67.

(*d*) Sugden, Law as administered in the House of Lords, 39, where various proposals for the amendment of the highest court of appeal are discussed. 'The House of Lords as a Court of Appeal' (8vo, 1850), and 'The Appellate Jurisdiction of the House of Lords, Privy Council, and Court of Chancery' (8vo, 1850), both by C. P. Cooper, Q.C., contain

The committee of the House of Lords appointed in 1856, to inquire respecting the appellate jurisdiction of that House, recommend the appointment of two Law Lords as salaried deputy speakers, to assist the House in the performance of its judicial duties. But that recommendation has not been carried into effect.

copious references to the debates and bills proposed in Parliament on the same subject. The system of appellate judicature in the House of Lords, and its defects, are very fully discussed in the evidence before, and Report of, the Lords' Committee on the appellate jurisdiction, 1856.

CHAPTER VII.

THE JUDICATURE OF THE PRIVY COUNCIL.

Besides the House of Lords, there is another supreme tribunal of appeal—the Queen in Council, whose judicial functions are delegated to the Judicial Committee of the Privy Council. The jurisdiction of the Committee is exercised principally to review judgments of the Colonial, the Ecclesiastical, and the Admiralty Courts.

The origin of the colonial appellate jurisdiction of the Privy Council has been differently accounted for by different writers. Mr. Macqueen is of opinion that, anciently, the jurisdiction was in Parliament, and occasionally delegated by Parliament to the Council until the time of the Tudors, but that then the Council began to exercise an independent jurisdiction of appeals from the dependencies of the Crown. And he says that the Parliament previously had "the supreme and ultimate jurisdiction" of the Norman islands(*a*). But the learned writer does not appear to have adverted with sufficient distinctness to the manner in which Parliament obtained the jurisdiction in question. The idea of an inherent jurisdiction of the Lords, though stoutly maintained by Prynne, seems to have been entirely exploded by later researches(*b*), and it scarcely admits of doubt now, that the judicature in Parliament, like every other judicature, was derived from the Crown as *fons justitiæ*. We have seen, in

(*a*) Macqueen, Appellate Jurisdiction, 676 *et seq.*, 682.
(*b*) Hargreave's Preface to Hale's Jurisdiction, p. ccxxvi.

the last chapter, that the appellate jurisdiction in Parliament with respect to error in English courts of law, was so derived; and the appeals from the foreign dominions of the Crown appear to have been anciently regulated by an analogous procedure. Thus, in a precedent mainly relied upon by Mr. Macqueen, an appeal from the Channel Islands in 18 Edw. II., the petition of appeal is to the King and his Council (*a nostre Seigneur le Roy e a son Conseyle*), and the answer is, "Let every one who feels himself aggrieved come to Chancery, and he shall have a writ in his case to bring the errors before the King to be redressed." The council referred to in the address of this petition is apparently, not Parliament, but the "ordinary" council, consisting of the Privy Council and certain judges and officers of the Crown; for, as Sir Matthew Hale observes, "this seems to be that council which is frequently mentioned in the Parliament Rolls and elsewhere, where petitions were directed generally *al Roy et son Councell, ou al Councell le Roy*" (*a*). This petition is enrolled in Parliament, but from the form of the petition and answer in this case and others of the same period (*b*) not cited by Mr. Macqueen, it seems clear that the appellate authority of Parliament was derived from the Crown originally, though in the time of Edward I. that authority had become confirmed by custom.

Mr. Macqueen thinks that appeals were first granted from Jersey to the Privy Council in the reign of Henry VIII., and adds that—"This separate and independent jurisdiction, once established and set in motion, was gradually extended—first, to the Colonies, and then to the East Indies, until, at last, the ancient allegiance of the Privy Council to the Court of Parliament was neglected and forgotten." It may be doubted, however, whether it is correct to treat the

(*a*) Hales, Jurisdiction, 5.

(*b*) See 'Petitiones in Parliamento,' Anno 18 R. Edwardi II., Rotuli Parliamentorum,' vol. i. p. 416 *et seq.* In the time of Edward II. Parliamentary Auditors and Triers of Petitions from foreign parts were regularly appointed by the Crown. (Hale's Jurisdiction, ch. 12.)

colonial jurisdiction of the Privy Council as a usurpation of the powers of the Court of Parliament; for though appeals from the dependencies of the Crown were occasionally adjudicated in Parliament, it by no means follows that that was the universal practice, or that the Council ever entirely relinquished their jurisdiction. Sir Francis Palgrave has remarked upon the difficulty of laying down general rules as to the jurisdiction of the Council in ancient times. "It is not easy," he says, "to define the manner in which the power of the Council was distinguished from that of Parliament. Yet we can discern that the judgments of the Council when delivered in Parliament were more binding and solemn"(*a*).

There is also positive evidence that in some cases at least, before the reign of Henry VIII., the Council determined appeals from the dependencies. The following are some such instances; and others probably could be discovered. In 27 Hen. VI., A.D. 1449, the Commons pray that errors in judgments by the Mayor and Constables of Calais may be brought before "the Chaunceller of England and the Kynges Counseill" to be redressed, and this petition, with some modifications not material to be here noticed, re-received the Royal assent(*b*). Again, by a Charter granted to the Island of Jersey by Henry VII., and dated Nov. 3, 1494, it is ordered that in case of any differences arising between the governors and judges of the Island, the matter was to be referred to the King in Council for determination and judgment(*c*). An order in Council of Queen Elizabeth, in 1565, referring apparently to the practice of appeals from the Channel Islands at a period long antecedent, directs that "no appeals should be made for any sentence or judgment given in the same isles hither, but only according to the words of their Charter, *au Roy et a son con-*

(*a*) Palgrave, 'Original Authority of the King's Council,' p. 22.

(*b*) 5 Rotuli Parliamentorum, 149. See also as to appeals from Calais, 3 Rot. Parl., 68, 87.

(*c*) Le Quesne, 'Constitutional History of the Island of Jersey,' 128.

seil, which agreeth, as Sir Hugh Paulet alleged, with such order and forme as hath heretofore been accustomed" (*a*). It is also worthy of remark that a statute of Henry VIII. appears to have authorized colonial appeals to be referred to Commissioners under the Great Seal (*b*).

It seems clear that the right of the Crown to receive appeals in colonial causes is now a prerogative which cannot be taken away, except by express words of an Act of Legislature to which the Crown has given assent; and the Crown may, in exercise of that prerogative, receive appeals even in cases which, by colonial legislative Acts, are made not appellable (*c*).

The Crown appears also to have a prerogative right of receiving appeals from all the British dependencies, even in matters of criminal jurisdiction; but leave to appeal in such cases has never been granted by the Judicial Committee of the Privy Council, on account of the obvious inconvenience of allowing the execution of penal sentences to be delayed by appeals. But in a case where a man appeared to have been irregularly convicted and sentenced by a criminal court in India, the Committee recommended an application to the Crown for inquiry respecting the sentence, and authorized the applicants to state that the inquiry was recommended by the Judicial Committee (*d*).

(*a*) Le Quesne, *ibid.*, 183.

(*b*) By 25 Hen. VIII. c. 19, s. 4, "for lack of justice at or in any the Courts of the Archbishops of this realm, *or in any the King's dominions*, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery; and that, upon every such appeal, a commission shall be directed under the Great Seal to such persons as shall be named by the King's Highness, his heirs or successors, like as in case of appeal from the Admiral's Court, to hear and definitively determine such appeals."

(*c*) In *re* Louis Marois, in 1862, the judicial committee of the Privy Council held that in a case, the judgment in which was by an Act of the Canadian legislature final, a petition for leave to appeal might be granted, on the ground that the Act in question contained a proviso reserving all prerogatives of the Crown; but the leave to appeal was granted *ex parte*, and subject to the risk of a counter-petition to dismiss the appeal as incompetent. (8 Jurist, N. S. 268. See also the case Joykissen Moorkerjee *v.* Reg. 9 Jurist, N. S. 4.)

(*d*) Joykissen Moorkerjee *v.* Reg., 9 Jurist, N. S. 4.

Passing over the history of the judicature of the Privy Council, after the period just referred to, we proceed to consider its present constitution, established by 3 & 4 Will. IV. c. 41. That Act provided that a permanent Judicial Committee should be appointed for the disposal of appeals and other matters referred to such committee by her Majesty in Council.

The Act provides that the committee shall consist of those members of the Privy Council who shall be judges of the Superior Courts of Common Law and Equity, and certain other courts, or who shall have exercised any of those offices, and two other members of the Privy Council, to be appointed by the Crown (s. 1).

All sentences of courts abroad, formerly appellable to the Admiralty or Prize Courts in England, are subject to be reviewed by this committee. All the appellate jurisdiction of the Queen in Council is exercised by the committee, who hear causes upon reference from the Crown; and, after hearing, make a report or recommendation to the Crown, the nature of such report being always stated in open court (ss. 2, 3).

Colonial Appeals.—The ordinary course of proceeding upon appeals from the Plantations, Colonies, and Settlements abroad, commences by application, within a limited time from the date of the judgment complained of, to the Governor or Court below, for leave to appeal to her Majesty in Council. In causes which are subject to appeal, the leave to appeal is granted as of right, where duly applied for. After it is allowed, a certified copy of all the necessary proceedings and evidence in the cause is transmitted to the Privy Council. The petition of appeal, which is addressed to the Queen, must be presented within a limited time. The parties proceed to prepare their respective *printed cases*, which are similar to those prepared upon appeals to the House of Lords. The arguments upon the hearing are also conducted in the same way as in the House of Lords.

The report of the committee is the judgment of the whole Court, and the reasons on which it is founded are usually embodied in writing, and they are delivered in open Court. At the first Council after the report has been read in Court, it is submitted to the Queen for approval; an order in Council is then drawn up, reciting and approving the report, and giving judgment accordingly, which the Governor or Court below is directed to carry into execution.

Rehearings are not allowed after the report of the Judicial Committee has been approved by the Queen in Council(*a*).

Ecclesiastical and Maritime Appeals.—We have already shown(*b*) that, so long ago as the reign of Henry II., it was enacted by the Constitutions of Clarendon that the final appeal in ecclesiastical causes should be from the Archbishops to the King. But, notwithstanding this enactment, and others passed in subsequent reigns, to restrain appeals to the See of Rome, such appeals were frequently made, up to the time of Henry VIII. The statute 24 Hen. VIII. c. 12, "for Restraint of Appeals," recites that divers inconveniences, not provided for by the former statutes, have arisen, "by reason of appeals sued out of this

(*a*) Macqueen's Appellate Jurisdiction, 705–724.

The Judicial Committee is further regulated by several statutes of the present reign. By 6 & 7 Vict. c. 38, appeals are to be heard by not less than three members of the Judicial Committee (s. 1), and may be heard by the same persons and officers as if appeals in the same causes had been made to the Queen in Chancery, the High Court of Admiralty, or the Commissioners in Prize Causes respectively (s. 5). By 7 & 8 Vict. c. 69, when petitions of appeal to her Majesty in Council are lodged, the Judicial Committee may be authorized to hear the appeals by a general Order in Council referring the same to them, without a special order in each case. The committee may make a general rule requiring from the colonial courts the judges' notes of evidence taken in the causes appealed, and the judges' reasons for or against the judgment pronounced. 14 & 15 Vict. c. 83, s. 15, adds to the committee the judges of the Court of Appeal in Chancery, if Privy Councillors. 20 & 21 Vict. c. 77, s. 115, similarly adds the judge of the Court of Probate.

(*b*) Book II. Ch. II., *ante*, pp. 302, 310. See as to the statutes here referred to, 4 Coke Inst. cap. 74.

realm to the See of Rome, in causes testamentary, causes of matrimony and divorces, right of tithes, oblations and obventions," and prohibits all such appeals for the future. The Act also provides a regular course of appeal from the inferior to the superior ecclesiastical tribunals, and that the judgments of the Archbishops should be final, and not appealable. By the subsequent statute, 25 Hen. VIII. c. 19, s. 4, it is provided that "for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty in the King's Court of Chancery; and that upon every such appeal, a commission shall be directed, under the Great Seal, to such persons as shall be named by the King's Highness, his heirs or successors, like as in the case of appeal from the Admiral's Court, to hear and definitively determine such appeals." A later statute, 8 Eliz. c. 5, provides that judgments pronounced "in any civil and marine cause, upon appeal lawfully to be made therein to the Queen's Majesty in her Highness's Court of Chancery, by such commissioners or delegates as shall be nominated and appointed by her Majesty," shall be final.

The commissioners under these Acts were commonly called the High Court of Delegates, which was, formerly, the great Court of Appeals in ecclesiastical causes, and from decisions of the Admiralty. But by the Act 2 & 3 Will. IV. c. 92, the High Court of Delegates was abolished, and its powers, both in ecclesiastical and maritime causes, were transferred to his Majesty in Council. By 3 & 4 Will. IV. c. 41, all appeals in prize suits and other suits in the Admiralty and Vice-Admiralty Courts, and other courts abroad, which might previously have been made to the Admiralty Court in England, are to be made to his Majesty in Council.

Appeals lie to the Privy Council from orders made upon petitions in causes of *lunacy* and *idiocy*. The Crown has, by prerogative, the custody of the persons and property of

idiots, lunatics, and persons of unsound mind, so found by inquisition, and delegates this office. The custody of lunacies was formerly entrusted, by appointment under the sign manual, to the Lord Chancellor only, but is now similarly entrusted also to the Lords Justices of Appeal in Chancery (*a*). The Judicial Committee also decides on certain applications with respect to the extension of patents of inventions.

(*a*) Macqueen, 752; 15 & 16 Vict. c. 87, s. 15.

CHAPTER VIII.

THE COURT OF CHANCERY.

One of the most peculiar features of the complicated system of English jurisprudence is the co-existence of two distinct codes of laws of property, administered by distinct tribunals (the courts of law and equity), and frequently affecting the same subject-matter; so that the same property which a court of law would decide to belong to one man, a court of equity adjudicates to another.

The judicature of the Court of Chancery was, beyond doubt, originally established as supplementary to that of the courts of law, and for the purpose of administering justice, where, from the strictness of the rules of law, or some other cause, the suitor's grievances would otherwise have remained unredressed. So far did the Court of Chancery proceed in interference with the course of common law, that we have seen(*a*) that in the reign of Henry V. it appears to have been considered that a mere allegation that the plaintiff was too poor to sue at common law, or that his opponent was too powerful for redress to be obtained against him in the ordinary tribunals, sufficed to give jurisdiction to the Court of Chancery in matters of purely legal cognizance.

But the jurisdiction of the court became after a time confined within narrower and more certain bounds, and limited to the administration of justice according to prin-

(*a*) *Ante*, Book II. Ch. V. sect. 3.

ciples which became gradually methodized into a regular system of jurisprudence, distinguished by the designation of "Equity."

In order to understand the respective provinces of courts of law and courts of equity, it is clear that it is necessary to know what is the distinction between law and equity. But, unfortunately, no general definition of that distinction exists or can exist; for the two systems have been established, not according to any preconceived method (in which case the definition might be possible), but have grown up independently of each other, and have been subject to incessant changes, partly statutory and partly juridical. It has been said(*a*) that a court of equity "has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and ample remedy cannot be had in the courts of common law." This description was doubtless at one time nearly correct as a general description of the distinctions between equity and common law, but will not bear very close criticism, and, being merely negative, gives no precise information as to the distinction between Law and Equity.

All matters determinable in the Court of Chancery have been classified under the following heads:—the common law jurisdiction; the specially delegated jurisdiction; the equity jurisdiction; and the statutory jurisdiction. With respect to the two former branches of jurisdiction, a very few words will be here sufficient. The Lord Chancellor has a limited common law jurisdiction—that is, a jurisdiction recognized by the common law—and in this capacity he holds pleas to repeal Letters-Patent, and on petitions of right and some other pleas, but this jurisdiction is rarely resorted to. The specially delegated jurisdiction is that delegated by the Crown for the administration of the estates of infants, lunatics, and idiots so found by inquisition; and is given, not to the Court of Chancery, but to the Lord Chancellor

(*a*) Story, Treatise on Equity, ch. 1, § 33.

and Lords Justices *personally*, by commission from the Crown(*a*).

The most important branches, however, of the jurisdiction of the Court of Chancery are the *equity* jurisdiction and the *statutory* jurisdiction. The former jurisdiction was originally given by the Crown, without the sanction of Parliament; the latter is originally founded upon Acts of Parliament.

In endeavouring to describe such of the principal branches of equity as are most important to the constitutional student, it will be convenient to divide them into two kinds: 1. Equitable rights; 2. Equitable remedies. The former are independent of the latter, for a right may exist without a necessity to seek a remedy for the violation of it in a court of justice.

1. *Equitable Rights.*—We have already said that in some cases the common law and Chancery regards different persons as owners of the same property. This diversity arises chiefly from the principles of the common law with respect to property held upon *trust*, that is, held by a trustee for the benefit of others. The common law courts do not enforce the obligations of the trustee, and, generally speaking, regard him as absolute owner of the trust property; whereas it is a principal part of the jurisdiction of the Court of Chancery to compel trustees to observe the duties of their trusts. A *trust* exists wherever a man has the legal dominion over property, and is at the same time subject to an obligation enforceable in equity to apply it for the benefit of others(*b*). The latter are said to be beneficially or equitably interested or entitled.

(*a*) Maddocks, Chancery Practice, book iv.; *ante*, Book II. Ch. VII.

(*b*) It is to be observed that it is not every fiduciary possession of property which constitutes a trust. A trust, properly so called, is enforceable in equity, and not at law; but there are certain fiduciary deposits of chattels for temporary purposes, which are recognized by the common law under the designation of *bailments*. A familiar instance of a bailment is the delivery of goods to a carrier.

The idea of the separation of the legal ownership of property from its beneficial enjoyment is a very ancient one. Blackstone dates its introduction into England, with respect to land, about the reign of Edward III.(*a*). Trusts of land were then, and long afterwards, called *uses;* and the trustee was said to hold the land to the use of the persons beneficially interested. There were two principal objects for which these "uses" were created. One was to evade certain difficulties, with respect to the disposition of land, which were produced by the system of feudal tenures. Without entering into the difficulties of this abstruse subject, it will be sufficient here to state that the feudal method of alienating or conveying land from one man to another, required a present delivery of the land by the former to the latter. From this doctrine resulted numerous impediments to the conveyance of land for various purposes, which the convenience of mankind required. Thus, to take a single instance, a conveyance could not be made to commence at a future time; for by the feudal system the conveyance of a freehold, to be effectual, must be accompanied by a present delivery of possession. But this was evaded by conveying the land to a nominal owner upon trust to convey the land to another at a future time. The law regarded the first-mentioned owner as absolutely entitled, but the Court of Chancery compelled him to make the subsequent conveyance.

Another object attained by uses was the evasion of the laws restraining the conveyance of lands in mortmain to religious bodies. The ecclesiastics devised a method of conveyance, not to themselves directly, but to nominees, *to the use of* their religious houses. The uses were upheld by the Court of Chancery, then under the direction of the clergy; and by this device, until it was frustrated by the statute 15 Rich. II. c. 5, the laws of mortmain were effectually eluded. Conveyances on trust were also much resorted to to avoid forfeiture for high treason, especially in the reign of

(*a*) 3 Blackstone, 52.

Henry IV., during the civil wars, and the contests between the Houses of York and Lancaster(*a*).

But besides these purposes and the like, trusts have in later times been used for others far more complicated. In modern times trusts have been found extremely convenient for securing the protection and distribution of property for the benefit of persons incapable for various reasons of undertaking the management of it. For instance, by means of trusts a testator is able to provide for the maintenance and education of his children after his decease, out of the proceeds of his property, real or personal; or, to take another instance, a debtor may provide by a trust deed for the management of his estate, and the distribution of its proceeds among his creditors by trustees.

The obligations annexed to the fiduciary possession of property may be created not only *expressly* by the language of the person creating the trust, but also by *implication* of equity, which has annexed to the fiduciary possession of property a multitude of rules in favour of the persons fiduciarily interested. Thus, in many cases a purchaser of trust property, having notice of the trust, becomes himself a trustee of the property: and in many other cases persons who come into the possession of trust property, without having been expressly appointed trustees, are held responsible for it in equity.

There are many other rights besides trusts which are enforced in equity, but not at law. The next in importance to trusts are perhaps those of mortgagors, who convey their land as a security for money lent to them. At law, according to the usual form of mortgages, the lender becomes absolutely entitled to the land after a certain time, if the money be not then repaid; but in equity the borrower continues to be regarded as entitled to redeem his land upon payment of what is due to the lender, and equity will not allow the mortgagor or borrower to be deprived of this right of redemption without giving him time

(*a*) 2 Blackstone, 272; 1 Kennedy's Chancery Code, 10.

to redeem. Other equitable rights are incidentally referred to under the next head of equitable remedies.

2. *Equitable Remedies.*—We have in a former chapter adverted to the distinction between the remedies of law and equity, and have shown that by recent legislation part of those distinctions are removed, but that many of them are permanent because the Court of Chancery has a far more extensive apparatus for carrying out its decrees and orders than is possessed by the Courts of Common Law.

Among the more important equitable remedies, the following may be selected as illustrative of the great variety and extent of the powers of the Court of Chancery: Account,—Administration,—Cancellation and execution of deeds,—Contribution,—Injunction,—Investment and appropriation of funds in Court,—Partition,—Priorities,—Receivers,—Sales under decrees,—Specific performance,—Schemes of charities.

A large part of the suits in the Court of Chancery involve the taking of *accounts*. They are taken in suits for dissolving and winding up partnerships, in suits between principals and agents, in suits against trustees for breach of trust, and in many other cases; these accounts are taken before the chief clerks of the equity judges. The common law courts have far less facilities for taking accounts; and consequently, where litigated accounts are too complicated to be taken at law, that circumstance is deemed a sufficient ground for making them the object of a suit in equity.

The *administration* of the estate of a deceased person is obtained in Chancery at the instance either of the persons responsible for the distribution of the estates, or of the persons claiming it. The relief which the Court of Chancery exercises under this jurisdiction, consists ordinarily in taking the requisite accounts of the estate, collecting the assets, and distributing them among the creditors and persons beneficially entitled.

Under the head of *cancellation* of instruments, the Court

directs the cancellation of unexecuted agreements entered into for illegal or immoral purposes, instruments procured by fraud, instruments which have been executed in ignorance or mistake of material facts. The *execution* of deeds is directed by the Court in many cases. Thus, where an instrument is by mutual mistake so expressed as to operate otherwise than was intended, the Court may rectify the mistake, and direct fresh instruments to be executed. In a suit for the redemption of a mortgage, a reconveyance to the persons entitled to redeem will be directed. In a suit for specific performance of an agreement for a lease, such lease may be required by the Court to be executed.

The equitable right to *contribution* arises where several persons are jointly liable to make some payment, and some of them have paid more than their just share. An instance of this right is where the same property has been separately insured with different insurers or underwriters. If one of them has been compelled to make good the loss of the property, he is entitled to contribution from the rest.

Injunctions, which are among the most important remedies of the Court of Chancery, are generally considered of two kinds. Those of the first kind restrain proceedings in law courts or other courts, and resemble in some respects the Prohibitions which, as we have seen, the common law courts issue to prevent proceedings in the ecclesiastical and other courts; with this difference, however, that Injunctions are not addressed to the court in which proceedings are to be stayed, but to the parties suing there personally. The ground for imposing this restraint is, that the cause is affected by equitable rights which cannot be properly adjudicated in the suit stayed. This injunction may be granted either to restrain the plaintiff at law from proceeding to obtain judgment, or, after judgment(*a*), to restrain him from proceeding to enforce execution of it.

(*a*) The right to grant injunction after judgment was at one time the subject of violent contest. In the reign of Henry VIII. it was an article of the impeachment against Wolsey, that he had examined matters in Chancery

The other kind of injunctions are directed to prevent threatened civil injuries, *e. g.* to restrain a trustee from committing a threatened breach of trust, or to restrain threatened irremediable injuries to property by acts of a tortious kind. Such injunctions include those against *waste*, where a person, having only a limited interest in an estate in his occupation, threatens to wastefully cut down timber, or otherwise injure the freehold; injunctions against threatened acts of infringement of copyright or patent-right; injunctions against obstructing the light of ancient windows.

Investment and Appropriation of Funds in Court.—The Court of Chancery has the custody of large funds. These arise principally from payments into Court, directed by the Court for the purpose of securing funds which are the subject of suits; another part of the funds in Court consists of moneys and stock voluntarily paid in by trustees in order to relieve themselves from responsibility. The suitors' moneys were formerly kept by the Masters in Chancery, and in the early part of the last century it was found that several of them had grossly abused the confidence thus placed in them, and embezzled large sums of the suitors' money. The discovery of these abuses, and of Lord Chancellor Macclesfield's complicity in them, led to his impeachment in 1725 (*a*), and to an entire change in the manner of keeping the suitors' funds. They are now kept at the Bank of England to the account of an officer of the Court of Chancery, the Accountant-General, who receives, invests, and pays out the suitors' moneys under the direction of the Court. Such funds, where the ultimate right to them does not accrue till a future period, may be retained in Court for many years—*e. g.* where one person is entitled to the interest for life, and on his decease another is entitled to the

after judgment at law. This right of the Court of Chancery was the chief point of controversy between Lord Chancellor Ellesmere and Lord Chief Justice Coke, and was decided by James I. in favour of the jurisdiction of Chancery. (See *ante*, p. 309 *n.*) There is a summary of the controversy in 2 Swanston's Reports, 22 *n.*

(*a*) 16 State Trials, 767.

principal. In such case, the Accountant-General will be ordered to pay the annual proceeds periodically to the former; and after the determination of the life interest, will be further directed to pay over the principal to the persons entitled in remainder. A large part of the Suitors' Fund consists of accumulations of stocks and dividends which have long remained unclaimed.

Partition.—We have already referred to the existing equitable and the former legal remedies of partition, and shown that the legal remedy became obsolete on account of its inefficiency (*a*). The right of partition commonly arises where several persons are co-owners of the same land. The Court of Chancery will, in a suit for the purpose, authorize proper persons to survey the land, and allot the respective shares. The allotment is effectuated by the several parties executing conveyances to each other of their respective shares; and where the estate is not susceptible of exact division, an allotment may be made subject to pecuniary compensations between the parties for its inexactness.

Priorities.—The most common instances in which the Court determines the respective priorities of claims upon the same property are where the property has been encumbered by successive mortgages and other charges; or where an estate administered under the direction of the Court is insufficient to satisfy all the claims upon it. In such cases, it rarely happens that all the claimants are entitled to be paid *pari passu;* and the duty devolves upon the Court of arranging the order of their claims, and of carrying the arrangement into effect.

A *Receiver* is appointed where an estate or fund is the subject of a suit, and there is no competent person entitled to hold it, or where the person so entitled misapplies a property which is subject to equitable claims. An instance of the former ground of appointing a receiver is where an infant's estate is not vested in trustees; an instance of the

(*a*) *Ante*, p. 383, Book II. Ch. III. sect. iv.

latter ground is where one of several partners has got the partnership property into his own hands, and excludes his co-partners. Receivers act under the continual control of the Court, and frequently have complicated duties imposed upon them, such as the management of landed estates.

Sales under Decrees.—A decree frequently directs that an estate be sold under the direction of the Court. For instance, estates mortgaged or otherwise encumbered are, in many cases, directed to be sold for the purpose of satisfying the incumbrances affecting them. Similarly, in suits for the administration of the estates of deceased persons, their estates may be directed to be sold for the satisfaction of debts. These sales are conducted by persons and upon conditions sanctioned by the Court; the abstracts of title and conveyances of the property sold may be ordered to be prepared by the conveyancing counsel appointed by the Court; and all the proceedings, to the completion of the purchase, are subject to its supervision.

Specific performance is another important branch of the remedial jurisdiction of the Court of Chancery. We have seen that formerly the courts of common law had rarely any power to compel the performance specifically of unexecuted contracts, their powers in personal actions being almost entirely confined to enforcing pecuniary compensation for the wrong complained of. But it is obvious that in many cases money compensation is a very inadequate remedy where specific acts have been undertaken to be performed, but the obligation is not fulfilled. The powers of the common-law courts to give relief in such cases are now somewhat enlarged, but are limited by the imperfect machinery of those courts for supervising the performance of contracts. The powers of the Court of Chancery are far more extensive in this respect, and that Court compels and controls the performance in detail of contracts mutually binding, and made for valuable consideration. Of course the Court will not direct specific performance where it is impossible, or where the defendant cannot be judicially

compelled to perform the contract properly. It is obvious that no court could effectually compel an author to fulfil properly his contract to write a book, or an actor to fulfil properly his undertaking to act at a particular theatre, though it may restrain him from acting, in breach of his undertaking, at a rival theatre. Among the instances in which the Court of Chancery can and does enforce contracts, are contracts for the sale or purchase of land, for granting leases, etc., where the non-fulfilment of the contract cannot be adequately compensated by damages.

Schemes of Charities.—Trusts for charitable and public purposes have long been, and continue to be, an important part of the jurisdiction of the Court of Chancery(*a*). A branch of this jurisdiction consists in directing *schemes* to be settled for the application of charities' funds, where the donor has not indicated the manner of applying them with sufficient precision; or where, from lapse of time and change of circumstances, the application originally intended has become impracticable. In approving of such schemes, the Court has regard to the general intention and purposes of the donor, so far as they are not prohibited by policy of law, and executes them approximately.

The foregoing enumeration of Equitable Remedies will be sufficient to show the multifarious nature of the powers of the Court of Chancery. These remedies are, for the most part, applied in regular suits by Bill and Answer, the nature of which has been already briefly explained(*b*).

(*a*) There is an auxiliary jurisdiction given by the Charitable Trusts Act, 1853, to a permanent board, called the Charity Commissioners for England and Wales, who have large powers of investigating the administration and condition of public charities. This body has the power of provisionally approving schemes for the reconstitution of various charities, subject to subsequent confirmation by Acts of Parliament. This board has now, by the Act 23 & 24 Vict. c. 136, limited powers of making certain *judicial* orders, subject to appeal to the Court of Chancery.

(*b*) Book II. Ch. IV. Bills of complaint are thus described in the Chancery Procedure Act of 1852 (15 & 16 Vict. c. 86, s. 10):—"Every bill of complaint to be filed in the said Court, after the time hereinafter ap-

Those pleadings, which are now required to be printed, state —the former the Plaintiff's, the latter the Defendant's case. Each party has, in general, the right of demanding from the other discovery of all circumstances within his knowledge, and all documents in his possession or power which afford evidence of his opponent's rights. This searching inquiry generally proves effectual to prevent suppression of the material facts of a cause. The method of procedure by Bill and Answer belongs to the original or non-statutory jurisdiction of the court; but a more summary method has been in some cases provided by statutes, which we now proceed to consider.

The *Statutory Jurisdiction* of the Court of Chancery is that conferred, not originally by the Crown, but by statutes, and is, for the most part, exercised upon *petition*, instead of the more formal procedure by Bill and Answer. Petitions are preferred on various incidental applications in the course of a regularly instituted suit; but the procedure by petition, to which we shall now advert, is that resorted to for a variety of objects not arising in the progress of such a suit, but dealt with under the summary jurisdiction by statute. It would not be expedient to enumerate here all the cases in which Acts of Parliament have thus usefully provided a convenient and expeditious mode of procedure. The petitions under this jurisdiction are written statements, differing not very materially from bills; but no answer or similar statement to the Court, in the nature of

pointed for the commencement of this Act, shall contain, as concisely as may be, a narrative of the material facts and circumstances on which the plaintiff relies, such narrative being divided into paragraphs, numbered consecutively; and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief."

A suit which relates to rights of the Crown, or rights protected by it, as those of public charities, is instituted by "Information," which requires the sanction of the Attorney-General, and differs little from a bill, except in the style.

pleading, is requisite. Many petitions are of such a nature that the Court does not hear any other parties but the petitioners by themselves; but where the justice of the case requires it, the petition must be served on those who have a right to be heard as respondents to it, and to produce evidence in opposition to it.

The statutory jurisdiction is of too multifarious a kind to admit of general description, except that it generally relates to trust property, or property of persons under various disabilities, and facilitates the management and application of such property. Among the more frequent cases under this head may be mentioned—petitions claiming the purchase-money paid into court under various Acts of Parliament which authorize the sale of property for public purposes, such as the construction of railways; petitions by persons claiming money paid into Court by trustees, who, by statute, are enabled by such payment to relieve themselves from the responsibility of applying the money; petitions by trustees applying to the Court for advice as to the execution of their duties; petitions for the appointment of new trustees of trust property, where it is impossible or difficult or inexpedient to appoint them without the aid of the Court; petitions for authority to lease or sell "settled" estates, that is, estates to which several persons are entitled in succession; petitions for "winding up" trading companies, when, by reason of their insolvency or for other reasons, their business is discontinued: in such cases the property and assets of companies may be collected and distributed among the persons entitled under the direction or supervision of the Court of Chancery(*a*).

The judges of the Court of Chancery are now,—the Lord Chancellor, the Master of the Rolls, two Lords Justices, and three Vice-Chancellors.

The Lord Chancellor is the highest ministerial and judi-

(*a*) The law relating to the winding up of companies is consolidated by 25 & 26 Vict. c. 89.

cial officer in the kingdom, and his office has existed from a very remote period of the history of England as an independent kingdom. There is little doubt that the office existed in Anglo-Saxon times, though with inferior authority to that given to it subsequently. The earliest office of the Chancellor was that of making out the Royal charters and keeping the Great Seal. No great political power appears to have belonged to his office until after the Conquest. In the time of William I., the Chief Justiciary was, after the King, the principal political person in the kingdom; but when the power of the Chief Justiciar became diminished in the manner referred to in a previous chapter(*a*), the Chancellor's authority greatly advanced, and in the time of Henry I. or Richard I. he appears to have become the principal member of the King's Council. As he was also an ecclesiastic, and versed in the civil law, it was natural that the separate equitable jurisdiction, which was established about the same time, should be entrusted to him(*b*). The appointment of clerical Chancellors began to be discontinued in the reign of Edward III., and in the forty-fifth year of that reign the Lords and Commons petitioned the Crown that lay persons should be appointed to this office; but ecclesiastics were most usually appointed in subsequent reigns until the reign of Henry VIII. Cardinal Wolsey was one of the Chancellors in the reign of Henry VIII., and Bishop Gardiner in that of Mary.

Until the year 1813, when a Vice-Chancellor was appointed by 53 Geo. III. c. 24, the Master of the Rolls was the only other judge of the Court of Chancery besides the Lord Chancellor. The latter heard original causes, as well as appeals from the Master of the Rolls; but since 1813, the Lord Chancellor, sitting as an equity judge, has usually heard appeals only. The appellate jurisdiction is now exercised by him and two Lords Justices, whose office was created by the Act 14 & 15 Vict. c. 83. The Court of Ap-

(*a*) *Antè*, Book II. Ch. II.

(*b*) 1 Spence's Equitable Jurisdiction, 79, 100, 117, 710.

peal thus constituted is authorized by the Act to exercise all the jurisdiction of the Lord Chancellor as a judge in Chancery. The decision of the majority of the judges is taken to be the decision of the Court; but if the Court be equally divided as to any decree brought before it by appeal, the decree is to be affirmed. The jurisdiction of the Court of Appeal may be exercised by the Lord Chancellor sitting alone, or with one or both the Lords Justices, or by the latter two sitting together.

The original hearing of causes in Chancery now almost entirely devolves upon the Master of the Rolls and three Vice-Chancellors, who have all separate courts. The office of the Master of the Rolls is of high antiquity. He acted as a ministerial officer—the keeper of the rolls on which the King's grants were entered—about the time of William the Conqueror. When the separate judicature of the Chancellor was established, he was assisted in the exercise of it by a council, consisting of the Master of the Rolls, and other Masters of the Court, whose office is now abolished. But for a long time after the constitution of this separate judicature, the Chancellor appears to have been sole judge ordinarily. In the reign of Edward IV., Bills were addressed to the Master of the Rolls, but probably in his occasional capacity of Keeper of the Great Seal. In a treatise published in the reign of Queen Elizabeth, the Master of the Rolls is described as having authority to hear causes *in the absence of the Chancellor;* and even so late as the reign of George II., in consequence of a controversy as to the judicial authority of the Master of the Rolls, it was deemed expedient to pass an Act of Parliament, declaring "that all decrees and orders of the Master of the Rolls, excepting such as, according to the course of the Court, ought to be made by the Lord Chancellor, were valid, subject to appeal to the Lord Chancellor" (3 Geo. II. c. 30)(*a*). It was not however until the year 1833 that the Master of the Rolls obtained complete power to dispose of original causes

(*a*) 1 Spence, Equitable Jurisdiction, 100, 358.

in every stage of their progress, for he heard neither motions, pleas, nor demurrers, until that time, when the requisite power was given to him. A Vice-Chancellor was first appointed in 1813, by a statute already cited. In 1841, in consequence of the increase of the business of the Court, the number of Vice-Chancellors was increased to three, and that arrangement has been continued by subsequent statutes(*a*). The Master of the Rolls and each of the Vice-Chancellors hear and determine the causes and matters which are set down before them originally, or which are subsequently transferred to them by the authority of the Lord Chancellor. They have no jurisdiction by way of appeal from each other.

The foregoing account of the powers and constitution of the Court of Chancery would be incomplete without some account of its subordinate officers, and the means and processes of the Court for carrying out and executing its multifarious decrees and orders. The officers who have the largest part of these duties are the *Chief Clerks* of the Master of the Rolls and the three Vice-Chancellors, who sit at the chambers of those judges to transact, under their immediate supervision, a great variety of business. Of this a principal part is the taking accounts and making inquiries, on the result of which the decree or order of the Court is subsequently to be founded. This part of the jurisdiction at Chambers arises by reference from the judge in Court; but another part of the jurisdiction is in matters which are commenced, and may be concluded at Chambers, without being heard in Court at all. Under this part of the jurisdiction at Chambers (*inter alia*) the estates of deceased persons are in many cases economically and expeditiously administered without the institution of a regular suit. For the purpose of exercising their jurisdiction, the Chief Clerks have by statute large powers to compel the attendance of parties and witnesses, and the production of evidence.

Another class of persons, who though not strictly officers of the Court, assist in carrying out its decrees and orders, are

(*a*) 5 Vict. c. 5, s. 19; 15 & 16 Vict. c. 80, s. 52.

its *Conveyancing Counsel*, to whom are referred various questions as to the title to real estate, and who are frequently appointed to settle deeds which are to be executed under the direction of the Court. Upon the *Registrars* devolves the duty of drawing up the decrees and orders, which are frequently very elaborate and complicated, and require numerous attendances of the parties interested. Where there is doubt whether the minutes of decrees as prepared by the Registrars, correctly express the judgment of the Court, the matters in doubt may be discussed before and determined by the judge in Court.

The officers above mentioned are ordinary officers of the Court of Chancery. But others are appointed merely for special occasions. Among these are *receivers*, of whose duties we have already spoken. Other occasional officers are *commissioners* authorized by the Court to carry out decrees for partition and for some other purposes.

All these officers have large discretionary powers, and in this respect they differ from the officers of courts of common law, who in general have little discretionary power. Among the officers of the Court of Chancery, who have no discretionary powers, but who are simply ministerial officers, for compelling obedience to the Court, the principal are the sheriffs, who enforce decrees and orders of the Court by attachment of the persons disobeying them, or by execution against their real and personal estate.

The Court, under both its equitable and its statutory jurisdiction, decides questions of fact as well as of law. Questions of fact are decided either by the judge in Court, or by directing inquiries at judges' chambers; or, where a question of fact is involved in doubt by conflicting or insufficient testimony, the Court may direct an issue to be tried by jury. Such issues have hitherto usually been directed to be tried in a common law court, but statutory power has recently been given to the Court of Chancery to cause any question of fact, arising in any suit or proceeding, to be tried by jury before the Court itself. The object of issues directed

to be tried at law is, not to bind the Court, but to satisfy its conscience; and the Court, if not satisfied with the verdict, may decide against it or direct a new issue(*a*).

(*a*) By 8 & 9 Vict. c. 109, s. 19, in every case where a court of law or equity may desire to have any question of fact decided by a jury, the Court may direct a writ of summons to be sued out accordingly. The provisions of the Act 21 & 22 Vict. c. 27, which enables the Court of Chancery to try issues by jury before itself, had very little effect in altering the practice of directing such issues to be tried at law. But by a statute of 1862, 25 & 26 Vict. c. 42, wherever any equitable relief or remedy is sought in the Court of Chancery, that Court shall determine "every question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends." The Equity Courts may however still direct issues of fact to be tried at assizes or at sittings in London or Middlesex for trial of common law issues, where it appears more convenient so to try such issues.

CHAPTER IX.

THE SUPERIOR COURTS OF COMMON LAW.

THE chief judicial administration of the common law of England is assigned to three Courts, the Queen's Bench (called the King's Bench during the reign of a King), the Common Pleas, and the Exchequer; of which the jurisdictions are now in a great measure alike, although altogether different originally. The Court of King's Bench is, as we have seen, a remnant of the Aula Regia, or great universal Court which William the Conqueror established to be held in his own hall, and which was bound to follow the King's household in all his progresses. Hence the processes issuing out of this Court are returnable *ubicunque fuerimus in Angliâ*, though the Court has, for centuries, usually sat at Westminster. But the Common Pleas became fixed to one place by the provision of Magna Charta, already mentioned—*communia placita non sequantur regi, sed teneantur in aliquo loco certo*(*a*).

The latter court, as its name implies, has, properly, cognizance of common pleas—that is, pleas between private persons. The King's Bench had, originally, jurisdiction of

(*a*) In a note to the third edition of Gilbert's 'History of the Court of Common Pleas,' page 3, it is said, "It is well worth observing that Britton, who was contemporary with Henry III., in whose reign this Court of Common Pleas was erected, does not say the Common Pleas must absolutely and necessarily be holden in Westminster Hall; on the contrary, he expressly says that they shall be holden at Westminster *ou aillours la ou nous voudrons ordiner*, or anywhere where we (the King) will ordain."

pleas of the Crown, except fiscal causes; and the Exchequer had, originally, jurisdiction of causes relating to the Royal revenue. The expedients and legal fictions to which these two courts resorted in order to obtain a share of the profitable jurisdiction of Common Pleas, were very curious. The King's Bench held that it had jurisdiction of common pleas in suits against *prisoners of the Court*. Accordingly, the usual preliminary (or prelude, as it might be more properly called) to an action there, was the pretended arrest of the defendant upon a fictitious criminal charge of trespass; after which, he was regarded as a prisoner of the Court, and liable to be sued in the proposed action. In the Exchequer, it was held that actions might be brought there by persons who were liable to account to the King, and the contrivance resorted to there to give jurisdiction was a fictitious suggestion that the plaintiff was debtor to the Crown (*a*).

By these means, the Courts of King's Bench and Exchequer obtained jurisdiction nearly co-extensive with that of the Court of Common Pleas with respect to personal actions—that is, actions not relating to the recovery of lands. But *real* actions, brought for the specific recovery of freeholds, remained under the exclusive cognizance of the Court of Common Pleas. However, by another string of legal fictions, depending on the principle, that though the

(*a*) Stephens on Pleading, ch. 1. In a note to Chief Baron Gilbert's 'History of the Common Pleas,' 3rd ed. p. 183, it is said, in reference to one of these contrivances, the process of *Latitat*, "If the Chief Baron had stigmatized this process of *Latitat* with the seemingly harsh but richly merited terms above mentioned, as Sir Orlando Bridgman, Chief Justice of the Common Pleas, did when the *Latitat* was first introduced into the King's Bench, he would perhaps have done no more than an honest indignation at the innovation would warrant." Bridgman was Chief Baron at the Restoration. (See 5 State Trials, 971.)

In Hale's Discourse concerning the Courts of King's Bench and Common Pleas, 1 Hargrave's Tracts, chapter 6 *et seq.*, and in the Life of Lord Keeper Guildford, by Roger North, there are notices of the competition between the Courts of King's Bench and Common Pleas in the time of Charles II., and the expedients contrived by each court to draw to itself business from the other. (See also Brown *v.* Babbington, Lord Raymond's Reports, 882.)

other Courts could not try a right of freehold, they could give damages for disturbing a leasehold right, those courts were enabled to try almost all claims of land, on whatever title they depended, whether freehold or leasehold, by means of an action of "ejectment."

The fictions above described are now abolished, and personal actions in all the three courts are commenced in the same way, by a writ of summons, commanding the defendant to appear within a limited time in the plaintiff's action (*a*).

But though the principal part of the jurisdiction of the three courts has become common to them all, they each retain some jurisdiction peculiar to them severally. It will be convenient to consider—(1.) The exclusive jurisdictions of the three Courts. (2.) Their concurrent jurisdiction. (3.) Their constitution. (4.) Their procedure. (5.) The Court of Exchequer Chamber.

1. *The Exclusive Jurisdictions of the Three Courts.*—The cases which fall under the exclusive jurisdictions of the three Courts are now far less numerous than those in which they have concurrent jurisdiction: whereas according to the ancient constitution of those Courts, they had little or no concurrent jurisdiction, each Court being established for entirely distinct objects. The Courts of King's Bench and Exchequer having, however, largely encroached on the province of the Court of Common Pleas, the exclusive jurisdiction of each Court now is principally its ancient jurisdiction, excepting so far as it has been affected by these encroachments.

The *Queen's Bench* is the Supreme Court of Common Law in the kingdom. The principal part of its exclusive jurisdiction is the holding *pleas of the Crown,* which include (*b*) all crimes and misdemeanours in the prosecution,

(*a*) 15 & 16 Vict. c. 76, s. 2. The statute 2 Will. IV. c. 39, known as the Uniformity of Process Act, abolished the diversity in the writs for commencement of personal actions in the different courts of law.

(*b*) As to the definition of Pleas of the Crown, see *ante,* p. 303, note (*c*).

of which the Crown, on behalf of the public, is plaintiff. The court is divided into a *Crown* side and a *plea* side. The latter is the civil branch of its jurisdiction. On the Crown side, or Crown Office(*a*), it has cognizance of all criminal causes, from high treason to the most trivial misdemeanour or breach of the peace, and is the principal court of criminal jurisdiction in the kingdom. For which reason, formerly, on the coming of the Court of Queen's Bench into any county, all former commissions of gaol delivery were absorbed and determined *ipso facto;* but this law has been altered by statutes, which enable the criminal courts of Westminster and Middlesex to hold their sessions, notwithstanding the sitting of the Queen's Bench at Westminster.

The criminal jurisdiction of the Queen's Bench is exercised, upon the removal of indictments by writ of *certiorari* from any inferior court. For the removal of an indictment into the Queen's Bench, this writ is issued from the Crown Office of that court. The writ has been most frequently used, in order the better to consider and determine the validity of indictments and proceedings thereon, or to prevent the apprehended danger of a partial or insufficient trial, in the original jurisdiction. The writ of *certiorari* is demandable as of right by the Crown, and issues as of course when the Attorney-General or other officer of the Crown applies for it either as prosecutor or as conducting the defence on behalf of the Crown(*b*); but the writ is not granted upon the application of a private person unless cause be satisfactorily shown to the Court, as that a fair trial cannot be had in the court below, or that difficult questions of law are involved. The writ may be sued out before as well as after indictment found, but is too late after a jury is sworn to try the cause(*c*).

(*a*) See, as to the abolition of certain offices on the Crown side of the Court of Queen's Bench, and the regulation of the Crown Office, 6 & 7 Vict. c. 20; 23 & 24 Vict. c. 54.

(*b*) Archbold, 'Pleading in Criminal Cases,' 83.

(*c*) 4 Blackstone, 265; Archbold, 'Pleading in Criminal Cases,' 82.

Another branch of the criminal jurisdiction of the Queen's Bench is the trial of misdemeanours upon an "Information"(*a*) filed in the Crown Office either *ex officio* by the Attorney-General at the suit of the Crown, or by the Master of the Crown Office at the suit of a private person. Informations lie for misdemeanours only, and not for treasons or felonies; for wherever the latter offences are charged, the law requires that the accusation should be warranted by the oath of a grand jury before the defendant be put to answer it. The usual object of informations *ex officio* are misdemeanours tending to disturb the Queen's Government, as seditious libels, seditious riots, or obstruction of officers of the Crown in the execution of their duties. The objects of other informations, filed upon the relation of private subjects, are notorious misdemeanours not peculiarly tending to disturb the Government, but which, says Blackstone, "on account of their pernicious example, deserve the most public animadversion." The most frequent instances of such informations appear to be in cases of attempts to bribe public officers, libels upon or attempts to intimidate magistrates and other officers with respect to the execution of their duties, and wilful misconduct by such

(*a*) Informations are as ancient as the common law itself. (4 Blackstone, 309.) Information of private relators are upon oath, but an information by the Attorney-General is not upon oath.

The statute 11 Hen. VII. c. 3, which was repealed in the next reign, authorized justices of assize and of the peace, upon bare information for the Crown to hear and determine offences against that Act. Coke says (3 Inst. 51) that this Act was contrary to the fundamental law of Magna Charta, and was the occasion of great oppression.

In 1688, the House of Commons agreed, on the recommendation of a committee, that, by the Bill of Rights, informations in the King's Bench should be taken away; but this provision was not contained in that statute, probably because of the objection of the House of Lords. (13 State Trials, 1369, note.)

A memorable debate took place in the House of Commons, in 1771, on the motion of Mr. Phipps, afterwards Lord Mulgrave, to take away the power of the Attorney-General to file criminal informations *ex officio*. (8 State Trials, 88.) For other references to Parliamentary debates on this subject, see 17 State Trials, 764; debates on the same subject, in 1765, and in July, 1812, are referred to, 20 State Trials, 693, 797, 799.

persons acting in their official capacities. Where an information is filed, either at the relation of the Attorney-General or a private person, it must be tried by a special or *petit* jury of the county where the offence arises; after which, if the defendant be found guilty, the court must be resorted to for his punishment(*a*).

Information in the nature of a writ of *quo warranto*, is a remedy given to the Crown against usurpers of any office or franchise. The information tries the civil right to a franchise, though it is commenced like other informations, being, in form, a criminal prosecution against the defendant for his usurpation(*b*).

Another branch of the exclusive jurisdiction of the Court of Queen's Bench is the issue of the prerogative writ of *mandamus*, of which the nature has been already considered(*c*). This writ is defined, by Blackstone, to be "a command issuing in the Queen's name from the Court of Queen's Bench, and directed to any person, corporation, or inferior court of judicature, within the King's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of Queen's Bench has previously determined, or at least supposes, to be consonant to right and justice." The writ is grounded on a suggestion by the oath of the party injured of his own right, and the denial of justice to him(*d*). The writ of prohibition, which we have also had occasion to consider, is another writ issuing properly only out of the Court of Queen's Bench, being the Queen's prerogative writ, but for furtherance of justice it may be now had, in some cases, out of the Common Pleas, and Exchequer.

(*a*) 4 Blackstone, 309.

(*b*) See, as to the proceedings of *quo warranto* in the time of Charles II., *ante*, p. 356; and 3 Blackstone, 263.

(*c*) *Ante*, Book II. Ch. V. p. 450.

(*d*) 3 Blackstone, 110. The Common Law Procedure Act 1854, which greatly extends the use of *mandamus* in all the law courts to enforce private rights, preserves (sect. 75) the jurisdiction of the Queen's Bench as to the prerogative writs of *mandamus* here mentioned.

The Court of Queen's Bench is the Court of Error from the Courts of Pleas at Lancaster and Durham(*a*).

The Court of Common Pleas is styled, by Sir Edward Coke, the lock and key of the common law; for herein only could "real" actions have been originally brought. And this Court has still exclusive jurisdiction in the "real" actions which yet exist. These relate to rights of dower and patronage of church livings. But real actions are now for the most part abolished, the action of ejectment above referred to affording, in most cases, a more convenient method of trying the right to land. Besides the few real actions which remain, the Court of Common Pleas has exclusive jurisdiction, as the Court of Appeal from the decisions of Revising Barristers(*b*). It possesses also, by 17 & 18 Vict. c. 31, a summary and final jurisdiction to remedy complaints against Railway and Canal Companies, for withholding reasonable facilities for traffic of railways or canals.

The Court of Exchequer was intended principally, according to its original institution, to order the revenues of the Crown, and to recover the King's debts and duties. It consists of two divisions: an administrative branch,—the Receipt of Exchequer,—which will be considered under the head of Administrative Government; and a judicial branch —the Court of Exchequer, commonly so called. This court had, until modern times, an equity jurisdiction, which has been transferred to the Court of Chancery. The Court of Exchequer has also an exclusive common law jurisdiction with respect to the property and fiscal rights of the Crown. This jurisdiction is exercised upon information filed in the Exchequer. Informations so filed by the Attorney-General are resorted to principally for the recovery of duties payable to the Crown, as succession duty, or penalties for the breach of the Customs and Excise laws, or for recovery of damages for injuries to the Crown lands, and the like(*c*).

(*a*) Com. Law Proc. Act, 1854, s. 102. (*b*) *Ante*, p. 107.

(*c*) 3 Blackstone, 261.

In his celebrated argument in the Bankers' case, A.D. 1700 (14 State

2. *The Concurrent Jurisdiction of the Superior Courts of Common Law*—that is, the jurisdiction which they possess in common—is principally exercised in *personal actions*, which are defined to be actions "whereby a man claims a debt or personal duty, or damages in lieu thereof; and likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property"(*a*). In the great majority of personal actions, the object is compensation in *damages* for the wrong complained of, though, on account of the inadequacy of this remedy, the Courts of Law have now given to them an extended jurisdiction to command the *specific* performance of contracts and duties, and a jurisdiction to *prevent* the commission of threatened wrongs(*b*).

Formerly, all actions at law were founded upon "original writs," appropriated each to some particular kind of action, and no cases were considered as within the scope of judicial remedy in the courts of law but those to which the language of some known writ was applicable. In this respect the English followed the Roman law, which prescribed set forms, or *formulæ*, for suits. And in the same manner, Bracton, speaking of the original writs on which all actions in the English courts were formerly founded, declares them to be fixed and immutable, unless by authority of Parliament.

The history of these writs is briefly as follows. The most ancient of them are of remote and undefined antiquity, and

Trials, 1), Lord Somers minutely examined the constitution of the Exchequer. He distinguished the three separate judicatures in it; the first, the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, which had a jurisdiction of appeal from the decisions of the Barons of the Exchequer; secondly, the Court of Equity, before the Treasurer, Chancellor, and Barons; thirdly, the Court of Pleas, before the Barons, who have cognizance of debts due to the Crown, and of torts done by receivers of the King's revenue. He held that the Barons of the Exchequer had no control over issues out of the Exchequer. But on appeal to the House of Lords, Lord Somers's decision in the Bankers' case was reversed, and the decision of the Barons of the Exchequer was affirmed, by which they had directed certain sums to be paid out of the receipt of Exchequer to claimants against the Crown.

(*a*) 3 Blackstone, 117. (*b*) *Ante*, Book II. Ch. III. sect. 4.

provided for the most obvious kinds of wrong; but in the progress of society, cases of injury arose for which these writs were not applicable, and therefore, by the Statute of Westminster the Second, 13 Edw. I., c. 24, power was given to the officers of the Chancery of framing new writs where required "in a like case (*in consimili casu*), falling under the same right, and requiring the same remedy," with those that formerly existed. Many new writs were produced according to the principle sanctioned by this Act, and other writs have been added from time to time by the express authority of the Legislature. These writs have had the effect of limiting and defining the jurisdiction of the Common Law Courts(*a*), and that effect continues, though the ancient diversity of forms of writs of summons, by which personal actions are commenced, no longer exists.

The most general division of personal actions distinguishes them according as they are founded upon *contracts* or upon "*torts*," or wrongs. Of the former nature are all actions upon debt or promise; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like(*b*). Where, from a given state of facts, the law raises a legal obligation irrespectively of any antecedent promise,

(*a*) Stephens on Pleading, 7; 1 Spence's 'Equitable Jurisdiction,' ch. 9; 3 Blackstone, 117.

(*b*) 3 Blackstone, 117; Spence's 'Equitable Jurisdiction,' 250.

The division of actions in the Roman law did not regard the distinctions between real and personal property observed in the division of English actions into Real and Personal. In the Roman law actions were distinguished, with respect to their subject, into (1) Real actions, founded on *jus in re*, in which a man demanded some certain thing that was his own; (2) Personal actions, founded on *jus ad rem*, or obligation, in which a man demanded what was barely due to him; (3) Mixed actions, in which some specific thing was demanded, and also some personal obligation claimed to be performed. But the principal kinds of personal actions conformed to the division referred to in the text, and were founded on obligations from contracts or from offences, *i. e.* from lawful or unlawful acts. Obligations were distributed into four species: (1) *Ex contractu*, from express contracts; (2) *Quasi ex contractu*, which are usually identified with implied contracts; (3) *Ex delicto*, from offences wilfully committed in violation of law; (4) *Quasi ex delicto*, from unlawful acts committed through negligence. (Geldart's 'Civil Law,' 76, 110.)

the breach of the obligation is a tort. But the distinction of the two kinds of actions is not always free from difficulty, because, in many cases, it is doubtful whether the obligation is dependent upon an *implied* promise, or is wholly independent of promise. To provide for this difficulty, it is now enacted that, whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, a plea shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or a wrong(*a*).

Contracts are express or implied, and wrongs are committed wilfully or negligently. Hence the fourfold division of obligations in the Roman law which we may adopt here for convenience: i. Express Contracts. ii. Implied Contracts. iii. Wilful Injuries. iv. Injuries not wilful.

The jurisdiction of the Common Law Courts, like that of the Court of Chancery, is to be ascertained rather by enumeration of particulars than by general definition. The following seem to be most important kinds of actions comprehended in the four divisions just mentioned.

i. *Express contracts.*—Actions founded upon express agreements are of several kinds, accordingly as the agreement is or is not contained in a deed or instrument under seal. Of the former kind are, actions of covenant; of the latter, actions of promise (*assumpsit*), which are founded on promises made orally, or by writing not under seal. This last class includes a great variety of actions, such as those to recover damages for the non-payment of money secured by promissory notes or other mercantile instruments; for the non-fulfilment of an undertaking to perform certain work, or of an undertaking to answer for the debt or default of another person, or of an undertaking to buy certain property(*b*).

ii. *Implied contracts* may (it is conceived) be defined to be those contracts which are evidenced by the conduct of men, and not by their language; and also those unexpressed obligations which the law annexes to contracts. These latter

(*a*) Com. Law Proc. Act, 1852, s. 74. (*b*) 3 Blackstone, 158.

obligations nearly correspond to the obligations *quasi ex contractu* of the civil law(*a*). Among the actions of *assumpsit* founded upon implied promises, are those to recover remuneration for work or services performed, or the value of goods bought without agreement as to remuneration or price, and for money laid out on behalf of the defendant at his request. The law implies in the first case an undertaking to give the proper remuneration, in the second to pay the fair price, in the third to repay the money. A very important class of implied *assumpsits* is that for money had and received to the plaintiff's use, where one has received money, and the law implies a promise on his part to account for it to the true proprietor. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund. It lies (*inter alia*) for money paid by mistake, or through imposition or extortion, or on a consideration which fails.

iii. *Wilful injuries* correspond to the *delicta* of the Roman law, and these are one species of "torts" as they have just been defined: the other species of torts being those to be mentioned in the next division. Wilful injuries are injurious either to persons or property. Among the former are assault, which is the attempt or offer to beat another, and battery, the actual beating another;

(*a*) A learned writer on ancient law has remarked, "It has been usual with English critics to identify *quasi*-contracts with implied contracts, but this is an error, for implied contracts are true contracts; acts and conduct are the symbols of the same ingredients, which are symbolized in express contracts by words; and whether a man employs one set of symbols or the other, must be matter of indifference, so far as concerns the theory of agreement. But a *quasi*-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract." (Maine's 'Ancient Law,' p. 344.)

It is submitted, however, that if the extended definition of implied contracts given in the text be adopted, those which are included in the second branch of the definition, correspond to *quasi*-contracts.

slander uttered against a man's reputation; libel affecting his reputation by writings, pictures, etc.; false imprisonment, or unlawful detention or confinement of the person(*a*); abduction of the plaintiff's wife or child; seduction of a daughter (the ground of which is the supposed deprivation of the labour or services of the daughter). Wilful injuries to property, cognizable in personal actions, comprise the unlawful taking or detainer of personal property out of the possession of the owner, and the damage of such property when in the possession of the owner. One remedy for unlawful taking is by action of *replevin*, so called because the plaintiff, previously to bringing his action, "replevies" the goods, that is, has them restored to his possession upon giving security to surrender them if the right be adjudged against him. This kind of action is as ancient as the time of Henry II., and is used where goods have been distrained, or taken into the custody of the sheriff for the satisfaction of rent, or other demand for which goods are by law subject to distraint. Another remedy for the unlawful taking of goods is by action of *trespass*, to recover damages for the loss of the goods; or if they be taken without force, there is a remedy by action of *trover* and *conversion*. This latter is one of the most frequent forms of actions of tort, and is applicable as well for the unlawful taking as for the unlawful detaining of goods where the facts show a conversion. It was originally used for recovery of damages from a defendant who *found* and converted to his own use the goods of another; but is now applicable wherever the defendant has converted to his own use the goods of another. For injury to things personal in the possession of the plaintiff, damages are recoverable in an action of trespass where the injury is direct, or in an action of "trespass on the case" where the injury is consequential only(*b*).

(*a*) As to the constitutional importance of actions of false imprisonment, see *ante*, p. 441.

(*b*) See 3 Blackstone, ch. 8 and 9.

iv. *Injuries not wilful,* which correspond to the wrongs *quasi ex delicto* of the Roman law, are to persons or property. Among the former are injuries to a man's health caused by neglect or want of skill, as by selling unwholesome provisions, the exercise of a noisome trade, or unskilful management of a physician or surgeon. For these and other wrongs, accompanied by force, there is a special remedy by action of trespass on the *case,* so called from the words *in consimili casu* above referred to in the Statute of Westminster the Second, which authorizes such actions. But by the common law the husband, wife, parent, or child of a person *killed* by negligence could not recover compensation for the injury sustained by the death of the relative. This defect of the common law was remedied by the beneficent provisions of the Act 9 & 10 Vict. c. 93, by which, whenever the death of a person is caused by such wrongful act, neglect, or default as would, if death had not ensued, have entitled such person to damages, the person liable may be sued by the executor or administrator for the benefit of the wife, husband, parent, or child of the deceased, provided that the death has caused pecuniary loss to such relations. Under this statute damages have frequently been recovered for death caused by the neglect of railway companies. An action of trespass on the case lies for injuries to property caused by negligence, as where the plaintiff's cattle are injured by a mischievous animal which the owner negligently suffers to go at large. Injuries caused by negligence are usually remediable by action on the case, but it is to be observed that such injuries are not all considered as "torts," but many of them are referrible to *implied contracts,* as where an attorney has injured his client by neglect of his business, or a carrier has negligently lost goods committed to his care(*a*).

Besides the concurrent jurisdiction of the superior courts in personal actions, they have also concurrent jurisdiction to issue writs of *habeas corpus,* of prohibition, and of *cer-*

(*a*) See, *inter alia,* 3 Blackstone, ch. 8 and 9.

tiorari, which last are writs for the removal of proceedings in various cases from an inferior to a superior court.

Another part of the concurrent jurisdiction is that of appeals from the decisions of justices of the peace and stipendiary magistrates upon informations or complaints which they have power to determine in a summary way. An expeditious method of determining such appeals has recently been given by the Act 20 & 21 Vict. c. 43, by which any such decision may be made the subject of a "case," to be stated for the opinion of either of these superior courts. Such case is to be stated at the instance of either party to the proceeding who is dissatisfied with the decision as erroneous in law. If the justices refuse to state a case, application may be made to the Queen's Bench for a rule commanding them to do so. The jurisdiction of the superior courts under this Act may be exercised by a judge at chambers, and the decision is final. There is also, by 13 & 14 Vict. c. 61, s. 14, an appeal to either of the superior courts of law against the decision of a county court judge in matters of law, but not against his decision in matters of fact.

3. *The Constitution of the Superior Courts of Law.*— The Court of Queen's Bench consisted formerly of a chief justice and three puisne justices, but now the number of the latter is increased to four. The Court of Common Pleas similarly consists of five judges, one chief justice, and four puisne justices. King James I., during the greater part of his reign, appointed five judges in the Courts of King's Bench and Common Pleas, for the benefit of a casting voice in case of a difference of opinion, and that the circuits might at all times be fully supplied with judges of the superior courts. And in subsequent reigns, upon the permanent indisposition of a judge, a fifth was sometimes appointed. And now, by statute 11 Geo. IV. & 1 Will. IV. c. 70, reciting that it is expedient that an additional puisne judge should be appointed to each of the su-

perior courts of law, it is enacted that wherever the Crown is pleased to make such appointment to either court, "the puisne judges of such court shall sit by rotation in each term, or otherwise, as they shall agree amongst themselves, so that no greater number than three of them shall sit at the same time *in banc* for the transaction of business in term, unless in the absence of the Lord Chief Justice or Lord Chief Baron, and that it shall and may be lawful for any of the judges of either of the said courts, when occasion shall so require, while the other judges of the same court are sitting in banc, to sit apart from them," for hearing motions, and discharge of various minor and incidental duties of the Court.

Since this enactment, the Court of Exchequer, like the two other superior law courts, has consisted of five judges. After the Norman Conquest to the time of King John, the persons who presided and sat in the Exchequer were the Chief Justiciar, the Chancellor, Treasurer, and Barons of the Exchequer. At a later period, when the authority of the Chief Justiciar had declined, the principal officers were the Treasurer, Chancellor of the Exchequer, and Barons of the Exchequer. These barons were in many instances lords of Parliament, but the word *Baron* was used to designate persons in various conditions of life besides Peers; and the judges of this court have retained the name of Barons, though they are not lords of Parliament(*a*). The Court consists now of a Chief Baron and four Puisne Barons.

4. *The Procedure of the Superior Courts of Law* has

(*a*) Madox, Hist. of the Exchequer, c. 5, c. 21.

But Spelman says, "Barones dicuntur quod olim essent e majoribus Baronibus regni." ('Glossarium,' *sub voce* "Barones Scaccarii.")

The Chancellor of the Exchequer (as to whose administrative functions see *infra*, Book III. Ch. VII.) is the chief officer of the Exchequer when sitting as a Court of Revenue, but he is not a member of the Common Law Court of Exchequer, the office of pleas. When the Chancellor of the Exchequer is sworn in, he takes his seat on the Bench; some motion, of course, is then made before him, after which he retires.

Whilst the office was held by Sir Robert Walpole, that statesman actually

already been considered briefly, with reference to the functions of judges and juries, the methods of pleading, and in some other particulars. All that appears necessary to be added here under the head of Procedure is a short account of the distribution of the business of the several courts.

Matters of law, such as the argument of demurrers, bills of exceptions or special cases, or motions for new trials, are disposed of in each court when *sitting in banc* (*in banco*), that is, by several of the judges sitting together; and if they be divided in their opinions, the judgment of the majority prevails. These sittings in banc formerly took place only during the legal "terms," the periods of which are now fixed by statute; but, in consequence of the increase of business, the courts have now power of appointing sittings in banc to be held during vacation.

One of the judges of each court usually sits each day during term at chambers, to dispose summarily of the minor and incidental business of court, such as motions to amend pleadings, to set aside judgments as irregularly signed, or to stay proceedings and applications for time to plead.

The decision of pure issues in *law* is vested, as we have seen, in the judges exclusively; issues in fact are usually tried by jury. Anciently, this trial by jury was before the court itself (*a*); except in some few cases, however, trials by jury have long ceased to take place before the superior courts, but are conducted by the auxiliary tribunals, to be mentioned presently. Where, however, causes are of great difficulty and consequence, the trial by jury may still be had before the judges in the superior court, as in the ancient practice. The proceeding is then technically said to be a trial at *bar*, to distinguish it from the more usual jury trial at *nisi prius*.

The courts of *Nisi Prius and Assize*, of the origin of which

sat and decided a cause in which the four Barons were equally divided. When there is no Chancellor of the Exchequer, the judicial duties of the office are performed by the Chief Justice of the King's Bench. (Manning's 'Serviens ad Legem,' app. No. 5.)

(*a*) Stephens on Pleading, p. 115.

we have already had occasion to speak (*a*), are held by various judges, and at various periods of the year. The trials at Nisi Prius in London and Middlesex are held both in and after term, before justices of the three courts (*b*). For the trials of Nisi Prius (and also for the criminal business of assizes), the rest of the counties of England and Wales are distributed in circuits, in which assizes are held in vacation, before persons appointed for the purpose by temporary commissions from the Crown, amongst whom are usually for each circuit two of the judges of the superior courts.

These commissions are several, relating partly to the criminal and partly to the civil business of the assizes. As to the latter, they are founded on the Statute of Westminster the Second (*c*), which directs two sworn justices to be assigned, associating to themselves one or two discreet knights of each county. The commissions are now directed to certain justices, Queen's counsel (*d*), and serjeants, and empower them to try all questions of fact issuing out of the courts of Westminster that are ripe for trial by jury. To prevent delay of justice, there is also issued a writ providing that if all the commissioners cannot be present, any two of them (a justice, Queen's counsel, or serjeant being one) may proceed to execute the commission (*e*).

The Sheriff's Courts, and other local courts, are occasionally used as auxiliaries to the three superior courts of law. The Sheriff's Court is held to assess, in virtue of writ of inquiry, the damages which the plaintiff has sustained in an undefended action. Also, by 3 & 4 Will. IV. c. 42, s. 17, a superior court may direct the issue in any action there

(*a*) *Ante*, p. 305.

(*b*) By the Common Law Procedure Act, 1854, s. 2, any one of these judges may try causes entered for trial at Nisi Prius in Westminster or London, in either of the courts, while any other judge of the same court is sitting to try causes at these places.

(*c*) 13 Edw. I. stat. 1, c. 30.

(*d*) By 13 & 14 Vict. c. 25, Queen's Counsel and Barristers having patents of precedence may act as Judges of Assize, though they be not of the Degree of the Coif.

(*e*) 3 Blackstone, 60.

depending, to be tried "before the sheriff of the county where such action is brought, or any judge of any court of record, for the recovery of debt in such county," where the sum sought to be recovered does not exceed twenty pounds.

Lastly, by the Common Law Procedure Act, 1854, s. 1, issues of fact may, by consent of the parties, be tried by any judge who might otherwise have presided at the trial thereof by jury. The Common Law Commissioners, in their second report, A.D. 1853, on which this enactment was founded, expressed the opinion that in several cases the trial by jury might be advantageously dispensed with; but did not recommend that such trial should be dispensed with without the consent of the parties, except in cases of mere account(*a*). Powers are given by ss. 3 and 6 of the Act to the judges to order compulsorily the reference of such matters to arbitration, before or upon a trial.

5. *The Court of Exchequer Chamber.*—From each of the three courts of Queen's Bench, Common Pleas, and Exchequer, an appeal lies to the Exchequer Chamber. This court was first erected by 31 Edw. III. c. 12, to determine appeals from the Barons of Exchequer, and consisted of the Lord Chancellor and Lord Treasurer, "taking to them the justices and other sage persons, such as to them seemeth to be taken," and was to be held "in any chamber of council nigh the Exchequer."

A statute of the time of Elizabeth (27 Eliz. c. 8) recites that erroneous judgments in the King's Bench could only be reformed by the High Court of Parliament; to remedy the consequent delay of justice, it is provided that judgments in actions commenced in the King's Bench (save where the Queen shall be party) may be brought by writ of error before the Justices of the Common Bench and Barons of the Exchequer, in the Exchequer Chamber, to be

(*a*) Second Report of Her Majesty's Commissioners for inquiring into the Process and Practice and System of Pleading in the Superior Courts of Common Law, p. 5.

examined by them, or six of them at the least; and from them there was to be an appeal to Parliament. A later statute of that reign, 31 Eliz. c. 1, contained a proviso that judgments in the Exchequer Chamber, on appeal from the Exchequer, should not be given except both the Lord Chancellor and Lord Treasurer should be present thereat. It was held that these officers might give judgment according to their own opinion, in opposition to that of the majority of the attendant judges, and that the latter were assistants only(*a*). In Coke's time, cases of difficulty were adjourned into the Exchequer Chamber from the Common Pleas, as well as the other courts, to be argued by all the judges(*b*).

The Court of Exchequer Chamber has been remodelled by the statute 11 Geo. IV. & 1 Will. IV. c. 70, which requires it to be so constituted that appeals from each of the three superior courts shall be heard before judges of the other two, seven judges at least being present. This appeal is by proceedings in error, "upon any judgment given by any of the said courts." It has been held that this provision extends to a judgment given against a defendant in the King's Bench on an indictment; and that error lies from the Common Pleas, not to the Exchequer Chamber, but to the King's Bench, for error in *fact;* which is where the judgment is defective on the ground of some error of fact not appearing in the record, as that the unsuccessful party was an infant(*c*).

(*a*) Bankers' case, 14 State Trials, 1. (*b*) Co. Litt. 71 *b*.

(*c*) R. *v.* Wright, 1 Adolphus and Ellis's Reports, 434; Castledine *v.* Mundy, 4 Barnewell and Adolphus's Reports, 90.

CHAPTER X.

COURTS OF CRIMINAL JURISDICTION.

We come now to consider one of the most remarkable branches of English law, that relating to criminal procedure. The methods prescribed by the Constitution for the trial of persons accused of crimes, and of determining the punishment of crimes, are characterized by a philosophical precision and spirit of justice, which have been often the admiration of jurists who have critically examined the jurisprudence of this and other countries. The English system has naturally received successive developments and improvements as succeeding ages have discovered their expediency; but even from the earliest times of our existing Constitution the necessity of carefully defining the manner of trying and punishing criminals has been recognized far more distinctly in our own than in foreign countries.

The distinction between criminal and civil procedure is common to every civilized nation. In the rudest forms of society, the distinction is imperfectly observed, but becomes more and more accurate and precise as men advance in civilization. The Romans had their *jus publicum—quod ad statum rei Romanæ spectat,*—and their *jus privatum—quod ad singulorum utilitatem pertinet.* Public judgments were those which related to crimes declared to be public by some law, and might regularly be prosecuted by any one of the Roman people, though not particularly interested in the prosecution. Private judgments were those which related to civil causes, in order to redress an injury as it affected an individual;

and were prosecuted by action which could be instituted only by the injured party(*a*). The distinction between public and private offences has been variously defined. Blackstone says(*b*), "Wrongs are divisible into two sorts or species; private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach of public rights and duties which affect the whole community, considered as a community, and are distinguished by the harsher appellation of crimes and misdemeanours." This definition however is imperfect, for private wrongs affect the whole community as well as public wrongs, because the whole community is interested in repressing both.

"The distinction between public crimes and private injuries," Professor Christian remarks, in commenting on an analogous passage in Blackstone (bk. 4, c. 1), "seems entirely to be created by positive laws and is referrible only to civil institutions. Every violation of a moral law or natural obligation, is an injury for which the offender ought to make retribution to the individuals who immediately suffer from it; and it is also a crime, for which he ought to be punished to that extent which would deter both him and others from a repetition of the offence. In positive laws, those acts are denominated injuries for which the legislature has provided only retribution or a compensation in damages; but when from experience it is discovered that this is not sufficient to restrain within moderate bounds certain classes of injuries, it then becomes necessary for the legislative power to raise them into crimes, and to endeavour to redress them by terror of punishment or the sword of the public magistrate. The word 'crime' has no technical meaning in the law of England."

That the distinction between public and private wrongs is

(*a*) Geldart's 'Civil Law,' book iii. ch. 9, 12.

(*b*) 3 Commentaries, ch. 1.

artificial, or dependent on positive law, appears by the consideration that wrongs which are reckoned by one nation or in one age as civil injuries, are often reckoned by another nation, or in another age of the same nation, as crimes. Thus, adultery is not by our law prosecuted criminally, whereas the laws of some other nations regard it as highly criminal, and in some instances, as in the Mosaic and Roman law, punishable by death (*a*). Again, in our own law, an offence at one period has been regarded as a civil injury, at another as a crime: for instance, the malicious setting fire to standing corn was, until recently, a civil injury only. Again, some offences are regarded both as civil injuries and as crimes. Thus battery and libel are injuries which may be redressed by civil action, and they are also indictable offences.

The great distinction between public and private judgments is apprehended to be this: the latter give restitution or compensation to the person injured; the former inflict on the wrongdoer punishment which is independent of private redress or restitution. The law may require the punishment to be accompanied by restitution where it is practicable; but the punishment is independent of the restitution. For example, by the common law the restitution of goods stolen was not directed upon the conviction of the thief, because the prosecution is at the suit of the Crown (*b*); by statute the law in this respect has been amended, but the punishment of the thief is independent of the restitution.

The distinctions between civil and criminal injuries are of course less distinctly marked in the early history of the law and civilization of a nation than at a later period, when the law has become systematic and exact. For a long period in our own history, we find civil injuries and punishable offences distinguished by lines of demarcation but very rudely traced. Among the Anglo-Saxons, heinous crimes were expiable by fines, and the Weregild, or com-

(*a*) See 1 State Trials, preface, xxxiii., as to the authorities on this subject.
(*b*) 4 Blackstone, 362.

pensation for murder, was regulated according to the rank of the person slain(*a*). After the Conquest, a defendant, upon judgment against him in a civil action, was liable to be *amerced* to the Crown, or fined for his delay of justice(*b*). But this custom, which has long been obsolete, merely shows that at the time when it was in force, the distinct offices of public and private judgments were imperfectly recognized.

It is not within the scope of this book to give an exact account of the crimes punishable by English law, but it will be convenient to state here the principal classes into which crimes are distributable. The common law recognized two classes, felonies and misdemeanours. Felony, in the general acceptation, comprises every species of crime, including treason, which occasioned at common law the forfeiture of lands or goods. Misdemeanours include all indictable offences which do not work forfeiture(*c*).

This division of offences has reference to some of their consequences, and is necessarily arbitrary. Blackstone divides offences according to their nature into the following classes:—those against Religion; those against the Law of Nations; those against the Crown and state; those against the Public; those against individuals(*d*).

Another division of crimes and misdemeanours has reference to the manner in which they are tried. In this respect they are divisible into two classes:—firstly, those

(*a*) 2 Hallam's 'Middle Ages,' chap. 8, part i.; 1 Palgrave's 'English Commonwealth,' 204.

(*b*) Coke shows (Griesley's case, 8 Rep. 38) that the custom existed in the time of Henry II., and was subsequently recognized by Magna Charta. He points out this distinction between these amercements to the Crown in real and personal actions, and amercements upon indictments; that the former were to be assessed *per pares*, the latter by the judges.

(*c*) See, as to forfeiture of lands and goods occasioned by felony or treason, 4 Blackstone, ch. 29.

There was another class of indictable offences besides felonies and misdemeanours, viz. Præmunire, the penalties of which were originally created by statutes directed against Papal usurpations, and subsequently imposed in cases not connected with Papal usurpations. But prosecutions on these statutes were very rare and are now obsolete.

(*d*) 4 Blackstone, 43.

which are punishable on summary conviction before justices of the peace, or other authorized persons, without trial by jury; secondly, those which are tried by juries.

The particular examination of the nature of the crimes which are included in each of these classes, and the degrees of punishment, belongs to treatises on criminal law. What we are here concerned with, is the modes which the law has adopted for investigating and determining criminal causes; and we shall therefore confine the attention to a general account of—(1) The Courts of Criminal Jurisdiction. (2) Their procedure with Trials by Jury. (3) Their procedure without Trials by Jury.

1. THE COURTS OF CRIMINAL JURISDICTION.—The Courts of Criminal Jurisdiction are those of *general* jurisdiction throughout the whole kingdom, and those of *special* jurisdiction, confined to particular parts of the kingdom.

The highest courts of Criminal Jurisdiction are the High Court of Parliament for the trial of impeachments and for the indictments of Peers, and the Court of the Lord High Steward, for the trial of indictments of Peers. Of these two courts we have treated already (*a*).

The next in rank is the Court of Queen's Bench, concerning the nature of which we have inquired in the preceding chapter. On the Crown side, this Court has cognizance of all criminal causes, from high treason to the most trivial misdemeanour or breach of the peace, either upon indictments or informations originally commenced in this Court, or upon indictments from inferior courts removed into the Court of Queen's Bench, in a manner and for causes already considered (*b*). The exercise of this jurisdiction is however comparatively infrequent.

Of the criminal courts of local jurisdiction, the most important are the courts of Oyer et Terminer, and general gaol delivery, which are held before special commissioners

(*a*) *Ante*, Book II. Ch. VI.

(*b*) *Ante*, Book II. Ch. IX.; Hawkins, 'Pleas of the Crown,' book ii. ch. 3.

from the Crown at *assizes*, at which also the commissioners are authorized to hold trials of civil causes at *nisi prius*; the origin of which is stated in the chapter relating to the origin of Courts of Judicature. The commissions which give the justices of assize their ordinary criminal jurisdiction are three:—first, the commission of the *peace*, which gives them the same jurisdiction as ordinary justices of the peace; secondly, the commission of *oyer et terminer*, to "inquire, hear, and determine" all treasons, felonies, and misdemeanours: *i.e.* to inquire by means of the grand jury, and to hear and determine by means of the petit jury; so that by virtue of this commission the judges proceed at the assizes on those indictments only which have been found at the same assizes. Therefore there is, thirdly, a commission of general gaol delivery, which empowers the judges to try and "deliver" every prisoner who shall be in the gaol when they arrive at the circuit town. For this purpose, the sheriff of the same county is required to bring all the prisoners of the gaol before the judges at the time appointed. We have already adverted to the importance of this commission of gaol delivery, by means of which the gaols are in general cleared twice, or in populous districts, thrice in every year(*a*). When the grand jury is discharged, such persons in gaol as are not indicted, and such as are, but against whom the bills were not found to be true, are *discharged by proclamation* made in the Court(*b*).

By the Habeas Corpus Act, 31 Car. II. c. 2, s. 7, a person committed for treason or felony must, upon his prayer to be brought to trial, be indicted in the next term or session of *oyer et terminer*, or gaol delivery; otherwise, on the last day of the term or session, the judges must admit him to bail, unless it appear on oath that the witnesses for the Crown could not be produced. Also, if the person committed be not, upon his prayer to be brought to trial, indicted and

(*a*) *Ante*, Book II. Ch. V.; 4 Blackstone 271; Hawkins, bk. 2, ch. 6.

(*b*) Ryland, 'Crown Circuit Companion,' ch. 3; 4 Chitty's Criminal Law, 342.

tried the second term or session after his commitment, he shall be discharged.

Sometimes, upon urgent occasions, the Crown issues a special or extraordinary commission of *oyer et terminer*, for the expeditious trial of offences which stand in need of special inquiry, upon which the course of proceeding is nearly the same as upon ordinary commissions(*a*).

The grand jury at the assizes for each county cannot regularly inquire of a fact done out of the county, unless particularly enabled by Act of Parliament. At common law, felonies were triable only in the counties in which they were committed; but the strictness of the common law in this respect has been relaxed in many cases by statutes; *e. g.* an offence committed within five hundred yards of the boundaries of two counties, or begun in one county and completed in another, may be inquired of in either. Murder and manslaughter committed by British subjects on land out of the United Kingdom, are triable in the county appointed in the commission for the trial. All offences committed on the high seas, and other places within the jurisdiction of the Admiralty, are triable at any court holden under commissions of *oyer et terminer* or general gaol delivery(*b*).

There has been from ancient times a court of gaol delivery, for London and Middlesex, held in the City of London. The present Central Criminal Court, established in 1834, has jurisdiction to hear and determine all treasons, murders, felonies, and misdemeanours committed in London, Middlesex, and adjacent parts of the contiguous counties. The court has cognizance of all offences committed on the high seas and other places within the Admiralty jurisdiction; but cognizance of such offences is given also to other courts of *oyer et terminer*. The Central Criminal Court sits twelve times a year, and oftener if necessary. The judges named in the commission include the judges and ex-judges of several courts; but in practice the trials are generally presided over

(*a*) *Ante*, p. 306; Hawkins, 'Pleas of the Crown,' bk. 2, ch. 5.

(*b*) 7 Geo. IV. c. 64, s. 12; 9 Geo. IV. c. 31, s. 7; 7 & 8 Vict. c. 2, s. 1.

by one of the judges of the superior courts of law, or one of the law officers of the City of London, together with one or more of the Aldermen of London(*a*).

The *General and Quarter Sessions*(*b*) of counties, and of divisions of counties having separate commissions of the peace, are held by the county justices of the peace, usually every quarter of the year, at times which are regulated by statute(*c*), for the trial of certain felonies and misdemeanours, and for some administrative purposes. The functions of the county justices, or magistrates as they are commonly styled, are, firstly, those which they exercise when assembled in General and Quarter Sessions for a whole county or division of a county; secondly, those which they exercise in *special sessions*; and thirdly, those which they exercise separately, in *petty sessions*, for smaller districts. The nature of the more extensive class of functions may be first stated.

The criminal procedure at General Sessions is, in many respects, similar to that observed at Assizes. These sessions cannot be held nor adjourned without the presence of two or more justices. When the requisite number of justices is present, they are said to constitute a *Quorum*; and those of them whose presence is necessary in order to proceed with the session, are styled the Justices or Commissioners of the Quorum. The word is derived from a clause in the commission issued by the Crown, by which the magistrates' authority is created. The commission was formerly in Latin, and the clause in question ran,—"*Quorum A. vel B. vel C. etc. unum esse volumus*" (of whom we will that A. or B. or C., etc., be one).

(*a*) 4 & 5 Will. IV. c. 36; 7 & 8 Vict. c. 2, s. 1.

(*b*) The quarter sessions are a species only of general sessions holden in the four quarters of the year, as prescribed by statute; but there may be other general sessions held if necessary, for the general execution of the authority of justices of the peace. Sessions held on special occasions for the execution of some particular branch of their authority, are called *special sessions*. (Hawkins, book ii. ch. 8.)

(*c*) 1 Will. IV. c. 70, s. 35, enacts that Middlesex Sessions shall be held twice every month. The jurisdiction of these sessions is similar to the ordinary jurisdiction of quarter sessions in counties. (See 14 & 15 Vict. c. 55, s. 13.)

The jurisdiction of this court, by 34 Edw. III. c. 1, extended to the trying all felonies and misdemeanours whatsoever, though they seldom, if ever, tried capital offences, or any but misdemeanours and minor felonies. The jurisdiction of Quarter Sessions is now defined by statute, prohibiting the trial there of treason, offences against the Queen or Parliament, offences against religion, perjury, forgery, setting fire to crops, etc., bigamy, abduction, concealment of birth, libel, bribery, stealing judicial records or documents of title, and some other offences. The justices are directed by their commission "that if a case of difficulty shall arise, they shall not proceed to give judgment, except in the presence of some justice of one of the benches or of assize." In accordance with this caution, indictments found at sessions for offences of which the sessions have jurisdiction, may be transmitted for trial at the assizes without *certiorari* (*a*).

The four Quarter Sessions are held uniformly at the prescribed periods of the year. But besides these, two magistrates, one of whom is of the Quorum, may at any time convene a General Session.

The justices assembled in sessions elect a chairman. The court may divide itself into two courts, and appoint a second chairman to preside in a separate court, for despatch of the business of the session.

Besides their original criminal jurisdiction, the justices in session have a *civil* jurisdiction, partly original and partly appellate, given to them by several statutes, which relates, among other things, to the regulation of gaols and houses of correction, the licensing of public-houses, and the management of county rates (*b*).

By far the greater part of the civil business of the sessions comes before the justices as a *court of appeal* (*c*). The justices in general session have, by various statutes, jurisdiction to hear appeals from the judicial acts of individual

(*a*) 5 & 6 Vict. c. 38; Dickinson's 'Guide to the Quarter Sessions,' ch. 3.
(*b*) Dickinson, ch. 8. (*c*) Dickinson, ch. 9, *et seq.*

magistrates done out of general sessions. Power of appeal from criminal *convictions* by such magistrates is given in various cases, and from *orders* of such magistrates, which they have jurisdiction to make by virtue of various statutes relating to the settlement and maintenance of the poor, the management of highways, and other matters of a civil nature.

The records or rolls of the session are committed to the care of one of the justices of the Quorum, denominated the Custos Rotulorum, who is appointed by the Crown, and is usually the lord lieutenant of the county.

Borough Quarter Sessions.—Besides the quarter sessions of counties and divisions of counties, there are, in many cases, quarter sessions held in corporate towns, before justices of their own, who within their own limits have the same criminal jurisdiction as the general quarter sessions of counties. These borough quarter sessions exist partly by ancient prescription and partly by statute. The Municipal Corporations Act enumerates a list of boroughs which are to have separate commissions of peace, and another list of boroughs which may have separate commissions of the peace granted by the Crown on petition from their Town councils. The Crown is authorized to assign any number of justices of the peace for any such boroughs. Also in every borough in which the council is desirous that a separate court of quarter sessions shall be, or continue to be holden, the Crown is empowered on petition from the council, to grant to it a separate court of quarter session, and to appoint a barrister to be recorder of the borough. The Court sits once every quarter of a year at least; the recorder is sole judge in it, and has cognizance of all matters cognizable by the county quarter sessions, except as to certain administrative matters. The justices of the county in which a borough is situated which has not a separate court of quarter sessions, have jurisdiction in such borough(*a*).

(*a*) 6 & 7 Will. IV. c. 76, ss. 98, 103, 105, 111.

Petty Sessions are private meetings of two or more justices of the peace in the same place, for the execution of some power vested in them by law: petty sessions are most frequently held under the summary jurisdiction which has been confided to two magistrates by numerous modern Acts of Parliament. A *special session* is a sitting of several justices, holden not of their own mere motion and private agreement, but after notice to all the justices entitled to attend, for the execution of some particular branch of their authority, such as the appointment of local officers. The important distinction between *petty sessions* and *special sessions* is that all the magistrates of a division have an option presented to them of attending the latter(*a*).

Justices of the Peace individually have a jurisdiction distinct from that which they possess in general and quarter sessions. In their criminal jurisdiction justices of the peace may require sureties of the peace or recognizances for good behaviour, or act for the suppression of riots; and have (as has just been observed) an extensive *summary* jurisdiction for the punishment of offences without the intervention of juries.

The number of offences punishable summarily without trial by jury exceeds the number of indictable offences, and includes a vast number of petty offences(*b*), such as petty trespasses, assaults, and thefts, vagrancy, infractions of bye-laws of railway companies, and of laws regulating public carriages.

This power of punishing offences by summary conviction is given by various statutes, and has been greatly extended in modern times, as will be seen in a subsequent part of this chapter relating to criminal procedure.

(*a*) Dickinson's 'Guide to the Quarter Sessions,' ch. 1, s. 2, 3.

(*b*) Such offences were anciently tried by jury in the Court Leet. Blackstone complains of disuse of the sheriff's tourn and court leet, the King's ancient courts, and the burdensome increase of the business of the justices of the peace; whose jurisdiction has, he says, been extended so far "as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases." (4 Blackstone, 281.)

Justices of the peace are ordinarily of two kinds—those appointed by *commission*, and municipal officers of boroughs. The authority of a justice appointed by the commission of the Crown may be determined at the pleasure of the Crown, either directly by writ under the Great Seal, or impliedly by a new commission, from which his name is omitted(*a*). Justices appointed by commission are so appointed on the recommendation of the Lord Chancellor, as has been already mentioned(*b*). By the Municipal Corporations Act, any number of persons may be appointed by the Crown by a commission, to act as justices of the peace for any of the boroughs specified in the Act. In boroughs not within the Municipal Corporations Act, the charters of the boroughs usually constitute certain of their municipal officers to be justices, and prescribe the manner in which vacancies in the offices are to be filled up(*c*).

The justices before mentioned constitute the unpaid magistracy. Besides these are stipendiary and police magistrates, having jurisdiction in various towns and populous places. By the Municipal Corporations Act, on application by the council of a borough, the Crown may appoint a police magistrate or magistrates for the borough; such magistrates are to hold their offices during the pleasure of the Crown, and have salaries payable out of the borough funds.

The metropolitan police courts are regulated by numerous Acts of Parliament, by which several such courts are established, and power is given to the Queen in Council to alter the number of them, which is restricted to twenty-seven. The magistrates are barristers, and have salaries. They usually sit alone, and when so sitting have generally jurisdiction within the metropolitan police district, to do acts usually required to be done by two justices out of general sessions(*d*).

(*a*) Burns's 'Justice of the Peace,' tit. "Justice of the Peace."

(*b*) *Ante*, p. 342.

(*c*) 5 & 6 Will. IV. c. 76; Burns's 'Justice,' *ubi supra*.

(*d*) 2 & 3 Vict. c. 71, s. 14; Burns's 'Justice,' tit. "Police (Metropolitan)."

In many towns and districts police courts are constituted, and stipendary police magistrates are appointed, under the authority of local Acts of Parliament. These magistrates, like the metropolitan police magistrates, have, in general, power to exercise their summary jurisdiction when sitting alone(*a*).

2. CRIMINAL PROCEDURE WITH TRIAL BY JURY.—The procedure of courts having criminal jurisdiction relates partly to offences tried by juries and partly to those tried without juries. The former kind of procedure is derived originally from the common law; the latter is in most cases created by statutes.

The regular method of proceeding with respect to offences tried by juries may be distributed under the following heads, in a progressive order:—(i.) Arrest or Summons; (ii.) Commitment on Bail;—(iii.) Prosecution; (iv.) Arraignment and Pleading; (v.) Trial and Judgment; (vi.) New Trial, Appeal and Reversal of Judgment.

i. *Arrest or Summons.*—Where an information or complaint in writing upon oath is laid before any justice of the peace that an indictable offence has been committed, or suspected to have been committed, either within his jurisdiction or by a person residing within his jurisdiction, the justice may issue a *warrant* for the apprehension of the accused, or may in the first instance issue a *summons*, and then, if that be disobeyed, a warrant for his apprehension(*b*). The warrant must state the cause for which it is made, and name or particularly describe the person to be apprehended. A *general* warrant to arrest all persons suspected of a par-

(*a*) By the Towns Police Clauses Act, 1847, s. 75, the summary jurisdiction in towns and places to which that Act applies, may be exercised by single magistrates. By the Act consolidating the law as to summary convictions, 11 & 12 Vict. c. 43, s. 33, every metropolitan police magistrate and every stipendiary magistrate of the police court of any city or place, may exercise this summary jurisdiction sitting alone.

(*b*) 11 & 12 Vict. c. 42.

ticular crime; not specifying them, is, as we have seen, illegal(*a*). A warrant by a justice of local jurisdiction may be executed in other jurisdictions if "backed," or countersigned, by the magistrates having authority there. Provision is made for thus executing warrants against English offenders who have escaped to Ireland or Scotland, the Channel Islands, and the colonies(*b*). Provision is also made for apprehension of certain offenders in foreign countries, under *extradition treaties* with those countries. The crimes to which these treaties apply are differently defined in different treaties, but generally include the more heinous felonies. These treaties are mutual in their operation. Under them, the surrender of a fugitive from either country is founded on a warrant, or equivalent document issued by a magistrate of that country, and specifying the charge, and upon sufficient proof to the magistrates of the country where the accused is found, of facts warranting his apprehension according to the laws of that country. With respect to arrests in England, effect is given to these treaties by various statutes(*c*).

Arrests may also be executed without warrant by justices of the peace, constables, and others, in various cases, including cases of breach of the peace or felony committed in their presence(*d*).

ii. *Commitment and Bail.*—When a person charged with any offence appears upon summons, or is brought before a justice, he takes the evidence against the accused, who may cross-examine the witnesses, and in general this examination is public, though the magistrate may take it in private, if that course appears conducive to the ends of justice. The

(*a*) *Ante*, p. 437.

(*b*) 11 & 12 Vict. c. 42, ss. 12–14; 14 & 15 Vict. c. 55, s. 18; 6 & 7 Vict. 34, s. 2; 16 & 17 Vict. c. 118.

(*c*) See 6 & 7 Vict. cc. 75, 76; 8 & 9 Vict. c. 120, with respect to extradition treaties with France and America.

(*d*) 4 Blackstone, 293.

statements of the witnesses are reduced to writing, and are then termed *depositions*.

The depositions are read over to the accused, and he is asked whether he will then make any answer to the charge, but is expressly warned that he is not obliged to do so. Whatever answer he makes is taken down in writing, and transmitted, with the depositions, if he be committed for trial.

If the evidence be insufficient to support an indictment, the accused may be discharged. Otherwise, or if the evidence raise a strong presumption of guilt, the accused is committed to prison to await his trial; or required to give *bail* to secure his appearance at the trial; or, when the offence appears to have been committed out of the jurisdiction of the examining magistrate, may be sent before another justice having jurisdiction. Some offences are bailable of right, and some in the discretion of the magistrate. Formerly felonies were not bailable, but they have been rendered so in various cases by statutes, which enumerate many kinds of felony and misdemeanour, with respect to which the magistrates may admit to bail in their discretion, and various other indictable misdemeanours which are bailable of right(*a*).

The Court of Queen's Bench has a discretionary power of admitting to bail in all cases of treason, felony, or misdemeanour, according to the course of that court(*b*). The Act just cited provides that no justice shall admit to bail a person accused of treason, except by order of a Secretary of State or of the Court of Queen's Bench.

The jealousy of our law with respect to the liberty of the subject, is shown by the numerous enactments which have been passed from very ancient times to the present, with respect to the right of bail. The Statute of Westminster the First, 3 Edw. I. c. 15, provides that "if any withhold prisoners replevisable after that they have offered sufficient

(*a*) See 11 & 12 Vict. c. 42, s. 23.

(*b*) See Archbold's 'Pleading in Criminal Cases,' sect. 9 of the first chapter, and 4 Blackstone, c. 22, as to the law of bail.

surety, he shall pay a grievous amerciament to the King." The Habeas Corpus Act, 31 Car. II. s. 3, requires the discharge of persons committed for bailable offences, and brought before a judge on *habeas corpus*. The Bill of Rights, 1 Will. & Mary, s. 2, c. 2, recites that excessive bail had been required of persons committed in criminal cases, to elude the laws made for the liberty of the subject, and declares that excessive bail ought not to be required.

iii. *Prosecution.*—The next step towards the punishment of offenders is their prosecution, which may be by *Indictment*, or by *Inquisition*, or by *Information*.

An indictment is a written accusation of a crime or misdemeanour, preferred to, and presented by, the grand jury upon oath.

The grand jury consists of any number of jurymen not less than twelve nor more than twenty-three, *probi et legales homines*. In the time of Bracton, the presentment of offences was by a jury of twelve returned for every Hundred in the county. But towards the close of the reign of Edward III. it became the practice for the sheriff likewise to return a panel of knights, which was called *le graunde inquest*. The inquests for hundreds still made their presentments, confined to their different hundreds; but as the grand inquest inquired for the county at large, the business of the hundred inquest naturally declined, till at length the whole burden of presenting and finding indictments devolved on the grand inquest, and the hundredors continued to be summoned merely for trying issues(*a*).

Grand juries(*b*) are incident to courts of criminal jurisdiction only, and their office is to examine into charges of crimes brought to them at assizes or sessions, and to de-

(*a*) 3 Reeves's Hist. of Eng. Law, 133.

(*b*) The qualification of grand jurors is the same as that of petit jurors at county sessions; but grand jurors at the assizes and borough sessions require no qualification by estate. (Archbold, 'Criminal Pleading,' p. 65; 1 Chitty's Criminal Law, ch. 6; 2 Hawkins's Pleas of the Crown, book ii., ch. 25.)

termine whether they ought to be tried upon indictment. Upon the opening of the assizes or sessions the grand juries receive a charge from the judge as to the nature of the cases likely to come before them, and then retire to receive indictments which are preferred in the name of the Queen(*a*), but at the suit of any prosecutor. The grand jury receive evidence for the prosecution, but not for the defence; and determine whether there be sufficient cause to call upon the accused to answer the charge. If they find sufficient cause by a majority of the jury, consisting of twelve at least, it is indorsed "a true bill;" otherwise they have it indorsed "no true bill," or "not found." The bill till found is not, strictly speaking, an indictment. The indictment, when found, is publicly delivered into court(*b*).

Besides indictments, the grand jury have power to make presentment of any offence from their own knowledge or observation, without any bill of indictment laid before them, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment before the party presented can be put to answer it(*c*).

The most usual mode of prosecution is by indictments; but the finding of a coroner's inquest is equivalent to the finding of a grand jury; and a defendant may be prosecuted for murder or manslaughter upon an *inquisition*, which is the record of the finding of a jury sworn to inquire concerning the death of a person *super visum corporis*. The duties of a coroner in cases "where any be slain or suddenly dead," are pointed out by the statute 4 Edw. I., which re-

(*a*) The following is an example of the form of an indictment:—"Middlesex to wit. The jurors of our lady the Queen, upon their oath, present that A. B., on the day of in the year of our Lord feloniously did steal, take, and carry away one coat of the goods and chattels of C. D."

(*b*) Hawkins's Pleas; Chitty's Criminal Law, *ubi supra*.

(*c*) 4 Blackstone, 302; *ante*, Book II., last section of Ch. V.

Persons accused of misdemeanours, and of certain treasons, are entitled to copies of the indictments previously to trial; but persons indicted of felony are not so entitled. All persons however committed or bailed for any indictable offence, are entitled to copies of the *depositions*. (11 & 12 Vict. c. 42, s. 37.)

quires the coroner in such cases to inquire into the circumstances of the death, and to take and commit to gaol persons found culpable by the inquisition. By 3 Hen. VII. c. 3, the coroner must deliver the inquisition afore the justices of the next gaol delivery in the shire where the inquisition is taken; the justices are to proceed against such murderers if they are in gaol, or else put the same inquisition afore the King in his bench. Inquests are holden in the coroner's jurisdiction where the dead body lies, though the cause of death may have arisen out of that jurisdiction(*a*).

The last kind of prosecution is by *information*, to which we have already referred in the preceding chapter, in considering the exclusive jurisdiction of the Court of Queen's Bench(*b*). Informations are for misdemeanours only, and not for felonies; and are filed in the Queen's Bench, or, in cases of revenue, in the Exchequer. Those informations which are filed by the Attorney-General *ex officio* at the suit of the Crown only, have been most frequently resorted to in cases of public injuries, as libels on the Government, obstructions of revenue officers, etc. In general, the trial of them is on the *nisi prius* side of the Court of Queen's Bench, and is conducted in the same way as trial on indictment for misdemeanour at the assizes. Other informations are those in the name of the Master of the Crown Office, who is to this purpose the officer of the public, as the Attorney-General is the minister of the Crown. They divide themselves into two classes—those filed against private individuals for many offences, among which are the libelling magistrates, and offences against the public peace; and those granted against magistrates for misconduct in their offices(*c*).

iv. *Arraignment and Pleading.*—The arraignment of prisoners against whom indictments have been found by the

(*a*) 6 & 7 Vict. c. 12. (*b*) Book II. Ch. IX.
(*c*) Chitty's Crim. Law, ch. 22.

grand jury, consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him; thirdly, asking him whether he be guilty or not guilty of the offence charged. A defendant is arraigned on a coroner's inquisition in the same way as upon an indictment.

The next stage (*a*) in the proceedings is the *pleading* to the indictment. Formerly, if the prisoner refused to plead, but stood mute of malice, this was equivalent to a conviction in cases of treason, petit larceny, and all misdemeanours, but in cases of other felonies, the prisoner subjected himself to the terrible sentence of *peine forte et dure* (*b*). But now, by 7 & 8 Geo. 4, c. 27, if he will not answer to an indictment or information, the Court may order the proper officer to enter a plea of not guilty, and the trial proceeds accordingly.

The manner of pleading in criminal cases is, as we have already pointed out, analogous in its principles to pleading in civil cases. The prisoner may plead either *to the jurisdiction,* that the indictment is before a court which has not cognizance of the offence; or a *demurrer,* insisting that the fact, as stated, does not amount in law to a crime; or a plea in *abatement,* which is principally for misnomer of the prisoner. All these modes of pleading have, however, for various reasons, fallen almost entirely into disuse. More substantial kinds of pleading are, *firstly,* special pleas in *bar,* which are a former acquittal, a former conviction, or a pardon; whereupon, if the defendant duly proves that he has

(*a*) An application to *quash* an indictment may be made on the part of a defendant before plea pleaded, or on the part of the prosecution before trial, or judgment for the defendant on demurrer. The application is made to the court where the indictment is found, in some cases to the Queen's Bench, the record being previously removed thither by *certiorari* from an inferior court. An indictment may be quashed where it is so defective that no judgment could be given upon it if the defendant were convicted. The Court will rarely quash an indictment for a felony or serious misdemeanour on the defendant's application. Before application on part of the prosecutor, a new bill for the same offence must have been preferred and found. (Archbold, 'Criminal Pleading,' 79.)

(*b*) 4 Blackstone, 425.

been already lawfully convicted, or acquitted, or pardoned, of the offence charged, that is an effectual bar to the indictment:—*secondly*, the prisoner may, which is the most usual course, plead orally at the bar, "guilty" or "not guilty." If the prisoner plead guilty, the Court has nothing to do but award judgment, but is usually reluctant to receive such a plea, and, especially in capital cases, advises the prisoner to retract it, and plead not guilty (*a*).

Where the defendant has demurred or pleaded specially, if judgment be against him on such pleading, his trial, in some cases, proceeds as if he had not so pleaded; but in other cases, the judgment against him is final. Thus, in cases of misdemeanour, a judgment for the Crown on a plea of abatement, or of previous acquittal or conviction, is final; but, in cases of felony, the prisoner, after such judgment, is put upon his trial. Judgment for the Crown on demurrer is, in some cases, final, and in others, the prisoner may answer over (*b*).

v. *Trial and Judgment.*—If the prisoner pleads the general issue, *i.e.* not guilty, it is incumbent upon the prosecutor to prove every fact and circumstance constituting the offence, as stated in the indictment or information. On the other hand, the defendant may give in evidence, under this plea, not only everything which negatives the allegations in the indictment, but also all matter of excuse and justification.

Indictments for treason or felony must be tried by common juries; but in important cases of misdemeanour, it frequently happens that one of the parties is desirous of

(*a*) Archbold, 'Criminal Pleading,' book 1, part i. ch. 4.

(*b*) Upon the trial of Algernon Sidney for high treason in 1683, at his arraignment he desired to put in some exceptions to the indictment, but the Court told him he must plead or demur. "Put in," said Lord Chief Justice Jefferies, "what plea you shall be advised; but if you put in a special plea, and Mr. Attorney demurs, you may have judgment of death, and by that you waive the fact." When Sidney offered a special plea, Mr. Justice Withins said, "Will you stand by it? Consider yourself and your life; if you put in that plea, and Mr. Attorney demurs, if your plea be not good, your life is gone." (9 State Trials, 820.)

having the issue determined by a special jury; and the Courts of Westminster have power in every case, except in indictments for treason or felony, upon the motion of either party, to order the issue actually joined before them to be tried by a special jury(*a*).

The manner in which juries are constituted, and their functions, have been considered in a previous chapter, and we have also had to consider some particulars as to the manner in which evidence is adduced, and arguments at the trial conducted(*b*).

When the prisoner has pleaded not guilty, and for his trial put himself "upon the country" (which country the jury are), the next proceeding is to call the jury.

At assizes and sessions, persons indicted of felony are usually tried immediately after the arraignment, or soon after; but in cases of minor misdemeanours, it is not uncommon to postpone the trial upon the defendant giving security to appear at the next assizes or sessions. The Court has authority to postpone trials of felonies as well as misdemeanours to subsequent assizes or sessions, subject to the restrictions of the Habeas Corpus Act, already referred to(*c*).

In cases of mere misdemeanours, where the defendant has not previously been in custody, he is not necessarily present at the trial, but may appear by attorney. In other cases of misdemeanour, and in all cases of felony, at the commencement of the trial the prisoner is called to the bar, and the jury is sworn before him; but he has an opportunity of exercising his right of challenge as to the several jurymen before they are sworn(*d*). The nature of the right of challenge, and the cases in which that right is given, have been adverted to in a preceding chapter(*e*).

When the jury is sworn, the prisoner, in cases of treason and felony, is given in charge to them, *i. e.* an officer of

(*a*) 1 Chitty's Criminal Law, 522.
(*b*) Bk. II. Ch. III. and IV.
(*c*) *Ante*, p. 445, 535.
(*d*) 1 Chitty's Crim. Law, 532.
(*e*) *Ante*, p. 353.

the court informs them of the indictment and plea of not guilty, and that their charge is "to inquire whether he be guilty or not guilty, and to hearken to the evidence." The prosecutor, or his counsel, then usually proceeds to open the case for the prosecution, by narrating its circumstances, and marshalling the evidence which he will adduce. The evidence for the prosecution is then adduced. If the prisoner be defended by counsel, he may cross-examine any witness for the prosecution; if the prisoner be not so defended, he himself cross-examines the witnesses, or the judge does so on his behalf. After the case for the prosecution is closed, the prisoner, or his counsel, address the jury for the defence, and, if they please, adduce evidence, written or oral. But if such evidence be given, (except where it is merely evidence as to the character of the person accused,) the prosecutor is entitled to a reply: and where evidence is given to prove new matter by way of defence which the prosecutor could not have foreseen, he is entitled to give evidence to contradict it(*a*). The Attorney-General, on an information *ex officio,* is entitled, as we have seen, to a reply, whether the defendant adduce evidence or not.

An important part of the trial is the summing-up of the judge, in which, after the case for the prosecution and the defence are closed, he reviews the whole, recapitulating the essential evidence, and directing the jury as to its legal effect.

The jury are then required to consider their verdict, which, as we have seen, must be unanimous(*b*). The verdict may be either *general*—"guilty" or "not guilty"—or *special,* which sets forth the facts found by the jury, and prays the judgment of the Court as to their legal effect.

When the verdict is guilty, or when the prisoner pleads guilty, he is said to be *convicted.* The punishment consequent on a conviction of felony is aggravated where the prisoner has been previously convicted of felony or certain

(*a*) Archbold, 'Criminal Pleading,' 126. (*b*) *Ante,* p. 361.

other offences. Where such prior conviction is charged in the indictment for a subsequent felony, the jury may, after conviction of the subsequent felony, but not before, be charged to inquire whether the prisoner has been so formerly convicted(*a*).

Upon conviction of felony or treason, it is demanded of the prisoner what he has to say why the Court should not proceed to judgment against him. This step in the proceedings—called the *allocutus*—is not necessary in cases of misdemeanour. The defendant may, at this stage of the proceedings,—that is, after conviction, and before sentence,—move the Court in *arrest of judgment*. This motion can be grounded only on some objection arising on the face of the record, and although the defendant omits to make the motion, the Court, if satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment, and thereupon all the proceedings are set aside, but without prejudice to a fresh indictment(*b*). A pardon, also, may be pleaded in arrest of judgment.

If judgment be not arrested, the Court pronounces the sentence which the law has annexed to the crime. Where, however, a point of law has been reserved at the trial for the consideration of the Court of Criminal Appeal, the judgment may be postponed(*c*); and also in some other cases, as where the Court takes time to consider the punishment which shall be awarded(*d*).

(*a*) See 24 & 25 Vict. c. 96, ss. 7, 8, 9, 116.

(*b*) By 14 & 15 Vict. c. 100, s. 25, objection to the indictment for any formal defect apparent on the face of it, is to be taken by demurrer or motion to quash the indictment, before the jury are sworn. The Court may then cause the indictment to be amended, and the trial proceeds as if no such defect had appeared.

If *variances* between the statements of the indictment and the evidence, as to the names of persons, etc., appear during the trial, the Court may, if it consider the variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence, order the indictment to be amended on such terms as to postponing the trial as the Court shall think reasonable. (Section 1.)

(*c*) 11 & 12 Vict. c. 76.

(*d*) 1 Chitty, Crim. Law, ch. 15, 16.

vi. *New Trial, Appeal, and Reversal of Judgment.*—After conviction, *a new trial* may in some cases be granted by the Court of Queen's Bench, but not by an inferior court.

In cases of felony or treason, it seems to be completely settled that no new trial can in any case be granted where the proceedings have been regular: but if the conviction appear to the judge to be improper, he may respite execution to enable the defendant to apply for a pardon(*a*). After *acquittal* of the defendant, a new trial will not be granted in cases of felony, nor in general in cases of misdemeanour; however in cases of *misdemeanour*, where the verdict has been obtained by the defendant by fraud or irregularity, as by keeping back witnesses for the prosecution, a new trial may be granted. So likewise it may be granted where the proceeding was substantially to try a right, as upon indictments for non-repair of a highway. A verdict for the defendant in a case of felony cannot be set aside, although against evidence and the judge's direction.

A new trial may be moved for on the ground of want of due notice of trial, or that the verdict is contrary to evidence or misdirection by the judge, or for improper reception or rejection of evidence, or for any other cause where it shall appear to the Court that a new trial will further the ends of justice.

Equivalent in effect to a new trial is a *venire de novo*, which may be granted where a *special* verdict has been returned, and the verdict is so imperfect that no judgment can be given upon it, or is manifestly erroneous, or is vitiated by irregularity in the trial(*b*).

Court for Crown Cases reserved.—Formerly, where a defendant, convicted upon indictment at assizes, took during the trial objections to the indictment or evidence, such objections were frequently reserved for the consideration of

(*a*) 1 Chitty, Crim. Law, ch. 15.

(*b*) 1 Chitty, Crim. Law, ch. 15; Archbold's 'Criminal Law,' 157.

all the judges, and if they held them sufficient they recommended a pardon. But the quarter sessions had no such power of reserving objections. This anomaly was corrected in 1848 by a statute(*a*), which constitutes a tribunal for the consideration of Crown cases reserved. Where any person is convicted on an indictment at a court of *oyer et terminer*, or gaol delivery, or quarter sessions, such Court may reserve any question of law for the consideration of the judges of the three superior courts of common law, and postpone judgment or respite execution until such question be decided. The judges of those superior courts constitute the *Court for Crown Cases Reserved*, which has power to finally determine the questions reserved for their consideration, and to direct execution of judgment or discharge of the person convicted accordingly. The jurisdiction thus given must be exercised by five of the judges at least, including one chief judge.

This court hears questions of law raised by the evidence or in arrest of judgment, or as to the sufficiency of the indictment. But questions of demurrer are not heard by this court, for as it is empowered to *finally* determine, it could not entertain such a question without taking away the right of the prisoner to appeal to the Queen's Bench, Exchequer Chamber, and ultimately to the House of Lords(*b*).

Proceedings in Error.—In the case last mentioned, and other cases, there is a course of appeal by *proceedings in error*, which have been considered in a previous chapter(*c*). Error in criminal cases lies for notorious mistakes in the judgment or other parts of the record, as where a man is found guilty of perjury, and receives judgment of felony, or where the offence is not sufficiently described in the indictment.

(*a*) 11 & 12 Vict. c. 78. (*b*) Archbold's 'Criminal Pleading,' 157.
(*c*) *Ante*, Book II. Ch. VI.

Reprieve and Pardon.—A reprieve temporarily suspends execution of a sentence, and may be granted either by the judge, as where he is not satisfied with the verdict, or where a woman capitally convicted is pregnant; or by the Crown, through the intervention usually of a Secretary of State, as where a convict becomes insane after judgment(*a*).

Pardon is an ancient prerogative of the Crown, but was limited by ancient statutes. The statute 2 Edw. III. c. 2, enacts that as to felonies and other trespasses against the peace, pardon shall be granted "only where the King may do it by his oath, that is to say, where a man slayeth another in his own defence, or by misfortune." The statute 13 Ric. II. s. 2, c. 1, enlarged by implication the powers of the Crown as to pardon; and now the Crown may pardon all public wrongs, with very few exceptions(*b*). The committal of a man to prison out of the realm is by the Habeas Corpus Act, 31 Car. II. c. 2, an offence unpardonable by the Crown. So are public nuisances, which, though indictable, could not be pardoned without infringement of the private right to have the nuisance abated. Neither can the Crown remit penalties to which the informer under a penal statute is entitled; but to this rule there are some exceptions(*c*).

Upon indictment for an indictable offence a royal pardon must be pleaded in bar of the indictment if obtained before

(*a*) 4 Blackstone, c. 31; Chitty, Crim. Law, ch. 19.

(*b*) 27 Hen. VIII. c. 24, s. 1, enacts that no person shall have power to pardon "any treasons, murthers, manslaughters, or any kinds of felonies whatsoever they be, nor any accessories to any treasons, murthers, manslaughters, or felonies, or any outlawries for any such offences, . . . but that the King's Highness, his heirs and successors, Kings of this realm, shall have the whole and sole power thereof."

(*c*) As to which, see 7 & 8 Geo. IV. c. 29, s. 69, and c. 30, s. 35. By 5 Will. & Mary, c. 20, s. 31, which authorizes the incorporation of the Bank of England, amerciaments, fines, and issues against the corporation, charged in suits against them, are not pardonable by the Crown.

See as to conditional pardons granted by governors of colonies, by the Crown, and by the Lord Lieutenant of Ireland, and as to revocable licences to convicts to be at large, 6 & 7 Vict. c. 7; 16 & 17 Vict. c. 99.

arraignment, in arrest of judgment if obtained subsequently but before judgment, in bar of execution if obtained after judgment. A statutory pardon need not be pleaded. A pardon under the Great Seal is not pleadable in bar of impeachment; but after impeachment and attainder the Crown may pardon(*a*).

The prerogative of pardon is of so great constitutional importance, that it will be proper to consider here some particulars as to the manner in which pardons were formerly granted, and the existing practice respecting them. Anciently, the right of pardoning offences within certain districts was claimed by the Lords Marchers, and others who had *jura regalia* by ancient grant from the Crown or by prescription; but by a statute of Henry VIII.(*b*) the sole power of pardon was given to the Crown.

Pardons were formerly granted under the Great Seal, and there is reason to suppose that before the Secretaries of State acquired the great power which has been given to them in modern times, pardons were regularly granted by the advice of the Privy Council. That this was the regular practice—though probably often disregarded through undue influence—appears from the consideration that all grants under the Great Seal were subject to various formalities, which required the concurrence of several ministers of state(*c*). There are several instances in the reign of Richard II. of the interposition of Parliament to restrain the undue grant of pardons by the Crown. In 13 Ric. II.,

(*a*) 4 Blackstone, ch. 31.

See, as to the nature of pardons, so far as relates to execution of the law against powerful offenders, *ante*, Book II. Ch. V.

(*b*) 27 Hen. VIII. c. 24.

Barrington, referring to repeated complaints with regard to pardons in ancient times, conjectures "that it was not only the abuse by the Crown which occasioned the clamour against them, but the consequence in point of interest to the barons. Most of them had very extensive jurisdictions, and grants of forfeitures, of which they were deprived by the King's pardoning offences, *et hinc illæ lacrymæ*." ('Observations on the Statutes,' tit. "Statutes made at Northampton, 2 Edw. III.").

(*c*) See *infra*, Book III. Ch. VI.

A.D. 1389, the Commons pray that it may be made a penal offence to solicit pardons from the Crown, that pardons so solicited may be of null effect, and that no pardon pass the Great Seal without warrant of the Privy Seal. To this petition the Crown assented, with some modifications as to the manner in which grants were to be expressed and passed; and on this petition and answer was founded a statute which, among other things, provided that officers of the Crown endorsing bills of pardon for murder by malice prepense, and certain other great crimes, should be subject to severe penalties. This part of the statute was, however, soon after abolished, on the ground that it encouraged malicious prosecutions of innocent persons, as no one dared to sue for their pardons(*a*). In the following reign, the Commons petitioned the Crown that all grants under the Great Seal should be made by the advice of the Privy Council, and that no pardon should be granted except by the advice of the Council(*b*).

The law continues to the present time to require that in *pleading* a pardon as a bar to an indictment, the pardon must be shown to be under the Great Seal, unless it be a pardon by statute. But with respect to pardons after conviction, the same necessity of a grant under the Great Seal no longer exists, and such pardons have been almost entirely superseded by pardons under the Royal sign manual, countersigned by a Secretary of State. When this important alteration of practice first became established, it would perhaps be difficult now to determine; but in the reign of George III. the usage prevailed of signifying, by sign manual, the Crown's intention of pardoning; and this declaration of intention was a sufficient authority to the judges to bail a prisoner, but was not equivalent to a pardon under

(*a*) 3 Rotuli Parliamentorum, 268; 13 Ric. II. stat. 2, cap. 1; 16 Ric. II. cap. 6.

(*b*) 3 Rotuli Parliamentorum, 572. The words of the petition with respect to pardons are, "et que le ditz Chanceller, Tresorer, et Gardeyn de Prive Seal et autre officers ne facent en cellos causes, sinoun per advis du dit Conseil, toutes voies de Chartres de Pardon de cryme," etc.

the Great Seal(*a*). At length a statute of George IV. provided, with respect both to pardons granted previously and to future pardons, that the discharge of convicted felons under pardons under the Royal sign manual, should have the effect of a pardon under the Great Seal(*b*).

The Royal prerogative of pardon is now exercised upon the recommendation of the Secretary of State for the Home Department(*c*). Where a judge before whom a prisoner has been capitally convicted thinks fit to reprieve him, and to send a certificate to the Crown, through the Secretary of State, that he is a fit object for pardon, the recommendation is always attended to(*d*). Occasionally also, upon a petition from a prisoner or his friends, an inquiry into the charge against him, and the circumstances of his conviction, will be instituted by the Secretary of State, and if he considers that the crime has not been sufficiently proved, or that there are adequate circumstances of extenuation, he will recommend the Crown to grant a conditional or absolute pardon.

It has been frequently contended that the Crown ought not to have a power of pardoning crimes. Bentham(*e*) thus sums up his arguments against the pardoning power:—"If the laws are too severe, the power of pardoning is a necessary corrective; but that corrective is itself an evil. Make good laws, and there will be no need of a magic wand which has the power to annul them. If the punishment is necessary, it ought not to be remitted; if it is not necessary, the convict should not be sentenced to undergo it." This argument seems to be directed against pardons granted

(*a*) Chitty, 'Treatise on the Law of the Prerogatives of the Crown,' ch. 7, sect. 2.

The sign manual, though no pardon, and revocable by the Crown, was an authority to the judges to bail a convict. (R. *v.* Miller, 12 Geo. III., W. Blackstone's Reports, 797.)

(*b*) 6 Geo. IV. c. 25.

(*c*) See *infra*, Book III. Ch. 6.

(*d*) 1 Chitty's Criminal Law, 770.

(*e*) 'Theory of Legislation. Penal Code,' part ii. ch. 10.

from motives of clemency, rather than against pardons granted from motives of justice,—as, upon discovery, after trial, of circumstances which establish the innocence of the convict. The present mode of investigating such circumstances, by a Secretary of State, may not be the best conceivable; but it is clear that some mode ought to exist of investigating such circumstances, and annulling a conviction discovered to be erroneous.

The chief objections to the present method of granting pardons on the recommendation of a Secretary of State—and they are very serious objections—are, that the inquiries by which he is guided are conducted privately, and not according to settled rules. It is well worth consideration whether these objections might not be removed by a return to the ancient rule which required that pardons should be granted by the advice of the Privy Council. That advice might be given after public investigation by the Judicial Committee of the Privy Council, or a similar committee. We have seen in a preceding chapter that in a recent case of an appeal from India, the Judicial Committee, while discouraging appeals in criminal cases generally, lent the sanction of its authority to an application to the Crown for further inquiry into an alleged irregular conviction (*a*).

3. CRIMINAL PROCEDURE WITHOUT TRIAL BY JURY.—The common law is, says Blackstone, a stranger to summary criminal convictions, except in cases of contempt (*b*). This statement should however be received with this observation, that in some of the cases comprised in the following enumeration, the criminal jurisdiction without trial by jury is immemorial, and not founded upon statutes.

The cases in which the law has authorized a criminal or punitory jurisdiction to be exercised in England without trial by jury, may be classified as follows:—*First.* The trials of impeachments and indictments in the House of Lords is clearly founded on the *judicium parium* recognized

(*a*) Book II. Ch. VII. (*b*) 4 Blackstone, 328.

by Magna Charta, and far more closely resembles the *judicium parium* than trial by jury does, for in the House of Lords' trials, the provinces of judge and jury are combined. *Secondly.* There are the cases in which, in order to maintain their own authority, the Houses of Parliament have summary power of punishing breach of privilege, and various courts of justice have analogous power of punishing contempts of court. *Thirdly.* There are the cases in which the methods of the civil law have, for various reasons, been allowed to prevail in the Admiralty and Ecclesiastical Courts, and some others. *Fourthly.* There are the cases in which the ordinary course of criminal procedure by trial by jury has been interfered with by special cases by Acts of Attainder *pro re natâ*. *Fifthly.* There are the cases (which are the most frequent cases of summary criminal jurisdiction) where general Acts authorize such jurisdiction to be exercised by inferior magistrates with respect to minor offences. *Lastly.* There are the cases comprised in Acts of Parliament authorizing Courts Martial(*a*).

Many of these classes have been already sufficiently considered. Of the second class, we have already considered those cases which are included in the summary jurisdiction of the two Houses of Parliament—cases of breach of privilege. Closely analogous to this jurisdiction is that of some courts of justice to punish contempts of court. This analogy has frequently been the subject of judicial observation. Thus, in the celebrated case of Brass Crosby, Lord Mayor, who was committed by the House of Commons in 1771, and brought before the Court of Com-

(*a*) As to the criminal jurisdiction of the House of Lords, *ante*, Book II. Ch. VI. As to the summary jurisdiction of the Houses of Parliament, *ante*, p. 203. As to the courts martial, *ante*, p. 320–2, *et infra*, Book III. Ch. VIII.

Other criminal jurisdictions, without trial by jury, which have been abolished, were the Star Chamber and the High Commission Court. See, as to the criminal jurisdiction of the Star Chamber, *ante*, pp. 235, 280, 319 n.

Formerly there was a jurisdiction to try before the Earl Marshal and High Constable, without jury, homicides of King's subjects in foreign countries committed by King's subjects. (*Ante*, p. 321; Butler's Co. Litt. 74 b, and note *ibid.*)

mon Pleas, the judges held that he must be remanded, on this ground—that all contempts are either punishable by the court contemned or by some higher court, and that as Parliament has no superior court, contempt against either House can only be punished by themselves(*a*).

In all cases of contempts of court, no presentment is necessary, for if they be done *in facie curiæ*, a record may be made thereon, and a punishment judicially inflicted and executed immediately; and even courts which have otherwise no criminal jurisdiction—as the Court of Common Pleas—may punish for contempt.

In Bushell's case, already mentioned, it was decided that a person committed for contempt by an inferior court might be discharged on *habeas corpus* by a superior court, where the return to the *habeas corpus* did not show a lawful cause of commitment: and cases were cited in which the King's Bench had thus discharged persons committed for contempt by the Chancellor, because the return did not expressly state the cause of contempt(*b*).

The superior courts of justice have immemorially exercised a jurisdiction to punish contempts by attachment, and subsequent proceedings thereon. These contempts are either *direct*, as by open insult to the court, or are *consequential*. Of the latter, the following are the principal instances:—Those committed by inferior judges and magistrates, as by disobeying writs issued out of superior courts; those committed by bailiffs or other officers, as by abusing the process of law; by attorneys, as by gross injustice to their clients; by jurymen or witnesses, as by default of appearance; by parties to suits, as by disobeying the orders of the court for payment of costs, etc.

Contempts of this latter class are constructive only, and are regarded rather as civil injuries than as public wrongs. Therefore, such contempts were not affected by the acts of

(*a*) See Appendix to Second Report on Sir F. Burdett's case; Hatsell; 8 State Trials, 32, and notes *ibid.* (*b*) 6 State Trials, 999.

general pardon which were frequently passed formerly(*a*); and obedience to any rule of court, ordering the payment of money, may be enforced by the ordinary writs of execution of civil process(*b*).

The process of attachment for contempt belongs to the superior courts by their inherent authority. Courts inferior to the courts of Westminster may fine and imprison for contempt if they be courts of record, as the courts of quarter sessions, and the courts of *oyer et terminer*. Courts not courts of record have not, in general, inherent authority to fine or imprison, but to most of them power to punish contempts has been given by various statutes(*c*).

The third kind of criminal procedure without trial by jury, is in those courts in which the civil law has been allowed to prevail.

The criminal jurisdiction of the Court of Admiralty is now obsolete, as offences formerly triable in that court are now triable by the Central Criminal Court, and at assizes. But anciently, the Court of Admiralty had cognizance of crimes committed at sea, or on the coast *out of the body of any county*. Of felony or piracy committed on the high sea, the common law took no notice, and such offences were cognizable only in the Admiralty Court, according to the civil law. But the criminal procedure in this court, being without a jury, was a great offence to the English nation, and a statute of Hen. VIII. provided that the offences just mentioned should be tried by jury(*d*).

(*a*) 4 Blackstone, 284. Acts of general pardon were frequent in many reigns, particularly those of Elizabeth and James I. The last of such Acts was 20 Geo. II. c. 52. See 6 Evans's 'Collection of Statutes,' 335.

(*b*) 1 & 2 Vict. c. 110, s. 18.

(*c*) Thus by 9 & 10 Vict. c. 95, s. 113, the County Courts have limited powers of inflicting fine and imprisonment for contempt of Court. As to the power of various courts of punishing for contempts, see R. *v.* Clement, 4 Barnewall and Alderson's Reports, 218, where it was decided that a court of gaol delivery may prohibit publication of proceedings of a pending trial, and punish disobedience to such order by fine.

(*d*) Co. Litt. 260 a; 4 Blackstone, 269. The King of England hath not

The jurisdiction of the Ecclesiastical Courts in criminal suits includes church discipline, and the correction of offences of a spiritual kind. The courts proceed in such suits *pro salute animæ* and the lawful correction of manners. Among the offences cognizable under this jurisdiction are offences committed by the clergy, such as neglect of duty, immorality, and the maintenance of heterodox tenets; and some offences committed by laymen, such as incest and incontinence, though this jurisdiction is nearly obsolete(*a*). These are termed "causes of correction." Ecclesiastical punishments common to the clergy and laity are monition, penance, and excommunication. Those peculiar to the clergy are sequestration, suspension, deprivation, and degradation(*b*). Excommunication is the highest ecclesiastical censure which can be pronounced by a spiritual judge(*c*). By 53 Geo. III.

only sovereignty over the British seas, but also an undoubted jurisdiction, in concurrency with other states, for the punishment of all piracies at sea in the most remote parts of the world; so that if any person, native or foreign, with whose country we are in amity, be robbed or spoiled in any sea, it is piracy within the Admiralty jurisdiction. (Charge to the grand jury in R. *v.* May, 13 State Trials, 455.)

If the persons robbed be subjects of a state at enmity with this country, although it may be piracy, yet it is not cognizable as such in any court of Admiralty within this realm. (Archbold, 'Criminal Pleading,' 361.) Piracy is felony, whether committed by a subject or by an alien. (4 Blackstone, 71.)

Numerous treaties have been entered into with foreign states for the suppression of the slave trade, which the Crown is, by various statutes, enabled to carry into effect. By 7 & 8 Vict. c. 26, the Crown is empowered to establish, by orders in Council, tribunals for deciding all questions which may arise under such treaties, and for the condemnation of vessels seized under them, and for punishing the violation of such treaties, and for enforcing the payment of penalties for such violation.

(*a*) The jurisdiction of the ecclesiastical courts in suits for defamation, and over laymen for brawling, is abolished. (23 & 24 Vict. c. 32.) This Act provides that it shall not be taken to repeal the statutes 1 Mary, sess. 2, c. 3, and 1 Eliz. c. 2, s. 18. These statutes preserve the ecclesiastical jurisdiction to punish disturbers of divine service.

By 1 Hen. VII. c. 4, priests may be punished by their ordinaries, by imprisonment, for incontinency.

(*b*) Report of commission appointed 1830, to inquire into the practice and jurisdiction of the ecclesiastical courts. This report gives a full account of the nature of the ecclesiastical courts, their practice and procedure.

(*c*) Geldart, 'Civil Law,' 152.

c. 127, it cannot be pronounced as a censure for disobedience to the decrees or contempt of the ecclesiastical courts, but only as a spiritual censure for offences of ecclesiastical cognizance, and does not subject to any civil penalty or incapacity except imprisonment for a period not exceeding six months.

By the Church Discipline Act, 3 & 4 Vict. c. 86, offences by clergymen against the ecclesiastical laws may be inquired into by certain commissioners appointed by the bishop, and if they find a *primâ facie* case against the accused, by the bishop or his commissary, with the assistance of three assessors.

The courts of the Chancellors of the two Universities of Cambridge and Oxford have cognizance of criminal offences and misdemeanours under the degree of treason, felony, and mayhem, committed by a scholar or privileged person, who may in such cases be tried before the Chancellor or Vice-Chancellor, without the intervention of a jury. The Courts of the High Steward of either University may also claim cognizance to try indictments found by grand jury in the ordinary way against scholars and other privileged persons, for treason, felony, or mayhem; but in such cases the trial is by jury(*a*).

The most usual kind of criminal procedure, without trial by jury, is that authorized by statutes, which give *summary jurisdiction* to be exercised by the inferior magistrates, for minor offences.

The power of a justice of the peace to convict an offender in a summary way, without trial by jury, is in restraint of the common law. Where this special power is given to a justice of the peace by Act of Parliament, it must appear that he has strictly pursued it; so that where a trial by jury is dispensed with, he must proceed nevertheless according to the course of common law in trials by juries, and

(*a*) Geldart's 'Civil Law,' 153; 4 Blackstone, 278.

consider himself only as constituted in the place both of judge and jury(*a*).

The course of proceeding under this jurisdiction is now chiefly regulated by a statute of the present reign(*b*), which provides a procedure applicable to the majority of cases in which a summary conviction or order may be made by justices of the peace out of session.

Generally(*c*), the first step to such a conviction is an *information* laid before a justice or justices, that a person has committed, or is suspected to have committed, an offence cognizable under this jurisdiction. The justices issue a *summons* in a prescribed form, stating shortly the matter of the information, and requiring him to appear, and answer it. If he do not appear in due course, he may be apprehended upon a *warrant*: where the information is upon oath, the justices may issue the warrant in the first instance, where there is danger of the person charged absconding, or of the object of the prosecution being otherwise defeated.

The information, where founded on any statute which directs that it shall be heard by one justice or several, is heard accordingly. Where there is no such direction, the information is heard by one justice of the place or county where the matter has arisen(*d*). The place of hearing is an *open court*, to which the public are to have free access. The informant and defendant may both appear by counsel or attorney, and cross-examine each other's witnesses. If the defendant adduce any evidence except as to his general

(*a*) Burns's Justice, tit. "Conviction." (*b*) 11 & 12 Vict. c. 43.

(*c*) The law, in various cases, allows the arrest of persons on criminal charges without warrant; and such cases include, not only charges of indictable offences, but also (in various police districts) those offences punishable on summary convictions to which the text relates. (See as to such arrests in the metropolitan police districts, 2 & 3 Vict. c. 47, ss. 64 *et seq.*)

(*d*) Every metropolitan police magistrate, and every stipendiary police magistrate of a town or place, may do alone whatsoever is authorized by the Act to be done by one or more than one justice of the peace. (11 & 12 Vict. c. 43, s. 33.)

character, the informant may adduce evidence in reply. At the conclusion of the hearing, the justices make their decision, either dismissing or convicting the defendant. The provisions of the statute here cited do not, however, extend to informations and complaints relating to excise and other revenue laws, as to which the procedure is regulated by various statutes.

The summary jurisdiction as to *juvenile offenders*, conferred by recent Acts, enables two justices of the peace to punish summarily juvenile offenders under the age of sixteen years, for offences not of a higher degree than simple larceny. The same jurisdiction may be exercised by any metropolitan police magistrate, or stipendiary magistrate, sitting in open court, and having power by law to do acts usually required to be done by two justices(*a*).

Summary jurisdiction is in some cases given to the justices by the *consent of the accused*. Where a person is charged before two justices in session, or a metropolitan police magistrate, or stipendiary magistrate, with petty larceny of property of small value, at the close of the evidence for the prosecution, the prisoner may be asked whether he consents that the charge be tried summarily, or requires it to be sent to trial by jury. In the latter case, there is an end of the summary proceedings. In the former, the justices have power to dispose of the case summarily. For some other offences, also, where the offender admits his guilt, and does not appear to have been previously convicted of felony, the justices may summarily sentence him to imprisonment and hard labour for a period not exceeding six months(*b*).

(*a*) 10 & 11 Vict. c. 82; 13 & 14 Vict. c. 37.

(*b*) 18 & 19 Vict. c. 126.

A complete account of the modern law of summary convictions, and of the jurisdiction given under the statute here cited, is given in Paley's 'Law and Practice of Summary Convictions,' etc., the fourth edition by Macnamara, 8vo, Lond. 1856.

CHAPTER XI.

COURTS OF SPECIAL CIVIL JURISDICTION.

THE superior courts of law and equity which have been hitherto considered, have general civil jurisdiction throughout England and Wales. Besides these there is a multitude of courts having special civil jurisdictions, which are defined by considerations either of locality or of the nature of the suits cognizable under them. It is not intended here to enter into a particular account of all these courts, but briefly to refer to the more important of them.

These special courts may for our present purpose be divided into two classes,—firstly, those which belong to some general system of judicature; secondly, certain isolated jurisdictions.

To the first of these classes belong the Ecclesiastical Courts, the Probate and Divorce Courts, the Admiralty Courts, the County Courts, and the Bankruptcy Courts.

The Ecclesiastical Courts are the courts of the archbishops, bishops, and their derivative officers. Of the origin of these courts we have spoken in the chapter relating to the origin of courts(*a*).

The ecclesiastical jurisdictions are of two kinds—contentious and non-contentious. Those courts which have a voluntary or non-contentious jurisdiction need not be here

(*a*) By the statute 1 Eliz. c. 1, "An Act to restore to the Crown the ancient jurisdiction over the estate ecclesiastical and spiritual, and abolishing all foreign powers repugnant to the same," all ecclesiastical jurisdiction for the visitation of the ecclesiastical state and persons, and reformation of offences, is annexed to the Imperial Crown. (Sec. 17.)

described, as they are not judicial. They are, in the words of Blackstone, who evidently did not admire them, "merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose, as granting dispensations, licences, faculties, and other remnants of Papal extortions"(*a*). Of these courts the chief is the Faculty Court, belonging to the Archbishop of Canterbury. The voluntary jurisdiction of all these courts with respect to wills and letters of administration, is now transferred to the Probate Court, to be mentioned presently.

The ordinary ecclesiastical courts are the *provincial* or archiepiscopal courts of the provinces of Canterbury and York; and the *diocesan* courts in each diocese.

The diocesan courts are firstly the *consistory* court of each bishop, exercising jurisdiction throughout the whole diocese; secondly, courts of commissaries appointed by the bishops, and courts of archdeacons or their officials, exercising limited jurisdiction in each diocese. The Consistory Court was formerly held in the nave of the cathedral, or in some aisle or chapel of the cathedral, the bishop presiding; but is now usually held by the bishop's chancellor in some convenient place in the diocese(*b*).

From the archdeacons there is an appeal to their bishops, and from the Bishops' Courts appeal lies to the courts of the Archbishops of Canterbury and York, which are independent of each other. The court of appeal of the province of Canterbury is the Court of Arches, so called because anciently held in the church of Saint-Mary-le-Bow (S. Maria de Arcubus). From the Archbishop's Court an appeal lies to the judicial committee of the Privy Council.

Besides the ordinary ecclesiastical jurisdictions just mentioned, there are many *peculiar* jurisdictions. Thus the Archbishop of Canterbury has a Court of Peculiars, which has jurisdiction over several deaneries not in the diocese of Canterbury. There are also numerous other royal, decanal, subdecanal, prebendal, rectorial, vicarial, and ma-

(*a*) 3 Blackstone, 60.

(*b*) Burns's 'Ecclesiastical Law,' tit. "Consistory."

norial peculiars(*a*). The jurisdiction of these peculiars is both contentious and voluntary, but the exercise of the former kind of jurisdiction is infrequent, and a great part of the voluntary jurisdiction has been abolished by the Act establishing the new Probate Court.

Causes cognizable in the Ecclesiastical Courts were formerly classified as beneficial, matrimonial, testamentary, and criminal. The testamentary jurisdiction is now transferred to the Probate Court and others, and the matrimonial jurisdiction, except as to granting marriage licenses, is transferred to the Court for Divorce and Matrimonial Causes. The criminal jurisdiction has been considered in the preceding chapter.

The beneficial jurisdiction relates principally to non-payment of ecclesiastical dues and fees, and certain suits to determine rights of ecclesiastical patronage, and validity of presentations to livings(*b*). Another class of suits under this jurisdiction are those brought by the incumbent of a benefice against his predecessor, or if he be dead, his executors, for dilapidations of the chancel or parsonage house.

The pleadings in the Ecclesiastical Courts somewhat resemble the pleadings in the Court of Chancery; both conform more nearly to the civil than the common law, for the pleadings are *at large*, as has been already explained in a previous chapter, and do not tend to definite issues. Ecclesiastical causes commence by *citation* of the defendant. Then follow the pleadings. In causes not criminal and not summary, the first plea is the complainant's *libel*(*c*),

(*a*) An account of these jurisdictions is given in the report of the commission appointed in June, 1830, to inquire into the practice and jurisdiction of the ecclesiastical courts. (See 12mo edition, Lond. 1832, p. 22.)

(*b*) As to the jurisdiction of the Ecclesiastical Courts with respect to rights of Advowson, see Burns's 'Ecclesiastical Law,' tit. "Advowson."

The Ecclesiastical Courts have power to take cognizance of suits concerning church rates, when the validity of them is in dispute; but where the validity of them is not in dispute, a summary jurisdiction is given to justices of the peace, with respect to the recovery of tithes and rates in certain cases. (See 5 & 6 Will. IV. c. 74; Gray *v.* Backhouse, 9 Jurist, N. S. 54.)

(*c*) But criminal cases in the ecclesiastical courts run in the name of the

which corresponds to the declaration at common law or the bill in Chancery, and contain his case. To this succeeds the defendant's *answer* upon oath, in which he denies or extenuates the charge. The defendant may also, in certain cases, propound his *defensive allegation*, which entitles him to an answer from the plaintiff upon oath(*a*). The parties then proceed to *proofs;* formerly the evidence of the witnesses was, as in the Court of Chancery, taken down in writing by an officer of the court, but now, in any suit or proceeding in any Ecclesiastical Court, witnesses may be examined orally in open Court(*b*).

The Court of Probate.—The jurisdiction of the Ecclesiastical Courts has been materially diminished by statutes of 1857, constituting the Courts of Probate and Divorce and Matrimonial Causes.

All voluntary and contentious jurisdiction of the ecclesiastical and other courts in testamentary causes, and with respect to granting or revoking letters of administration, is now taken away from those courts and transferred to other courts, of which the principal is a "Court of Probate" sitting in London. The judge of this court is to be appointed by the Crown, and has jurisdiction throughout all England(*c*).

The jurisdiction of the court consists of two parts,—voluntary and contentious. The former is exercised in the grant of probate of a will, or of letters of administration in *common form*, where there is no contention as to the grant. The latter is exercised where the grant is contested.

The grant of probate of a will *authenticates* the right of the *executor* appointed by the will to deal with his testator's personal estate, and execute his office of executor. But where a man dies intestate, or without appointing an executor, or

judge, and are called causes of offices, or causes of office of judge promoted. In such causes the proceeding is not by libel, but by articles. (Report of Commission on Ecc. Courts, p. 37.)

(*a*) Geldart's Hallifax on the Civil Law, book iii. ch. 11.

(*b*) 17 & 18 Vict. c. 47. (*c*) 20 & 21 Vict. c. 77.

the appointment fails, letters of administration may be granted, conferring on an *administrator* an office equivalent to that of an executor. The grant of probate or administration in "common form" is now made either in the Principal Registry in London, or in the District Registries throughout England and Wales, defined by the Act just mentioned.

But where there is a contention as to the right of probate or administration, or where such contention is apprehended, the right may be determined judicially. The right may be disputed on many grounds, as that a will has been made by a person of unsound mind, or has not been properly executed, or that the claimant to the office of administrator is not entitled to it.

Parties interested in the estate of a deceased person may enter *caveats* in the proper registry, entitling them to be warned before grant of probate or administration, so that they may have opportunity to appear and oppose the grant. The executor or claimant of grant of probate of a will may be called upon by parties interested to proceed, or of his own accord may proceed, to prove it in *solemn form*, after citation of parties interested, who, if they do not appear, are in general thenceforth barred from contesting the grant of probate. A probate or grant of administration may also be *revoked* on a suit by citation (*a*).

The contentious testamentary jurisdiction is exercised in all cases by the *Court of Probate*, excepting that jurisdiction is given to the County Courts (which will be subsequently described), where the estate of the deceased does not exceed a small defined amount. An appeal lies from these courts to the Court of Probate, as to questions of law and questions of admission or rejection of evidence. The Court of Probate has power to cause any question of fact arising in suits under this Act to be tried before the Court itself, or by means of an issue directed to any of the superior courts of law (*b*).

(*a*) Williams, 'Law of Executors and Administrators,' part i. books 4, 6.

(*b*) 20 & 21 Vict. c. 77. The practice of the Court of Probate, and the

The Court for Divorce and Matrimonial Causes.—By a statute of the year 1857, the jurisdiction previously exercised by the ecclesiastical courts in matrimonial causes and matters, except in respect of marriage licences, was transferred to the Court for Divorce and Matrimonial Causes, and jurisdiction was given to this court to pronounce decrees for judicial separation (which have the same effect as decrees for divorce *à mensâ et thoro*, formerly decreed by the ecclesiastical courts), and decrees in suits of nullity of marriage, for restitution of conjugal rights, or jactitation of marriage. The Act has also conferred on the court a jurisdiction as to dissolving marriages, which did not previously belong to the ecclesiastical courts.

The Judge Ordinary of the Court of Probate is constituted Judge Ordinary of the Divorce Court. The Lord Chancellor and the judges of the three superior courts of law, are also judges of this court; and in the absence of the Judge Ordinary, one of the equity judges, or the Admiralty judge, may sit for him(*a*).

The Judge Ordinary sitting alone may exercise the whole jurisdiction of the court, or he may, if he think fit, have the assistance of another judge of the court in hearing any matter in his jurisdiction, or he may direct that any such matter shall be heard before the full Court(*b*).

Applications for restitution of conjugal rights, or for judicial separation on the grounds of adultery, cruelty, or desertion, may be made either to the Divorce Court or to the Assize Courts(*c*). Formerly the ecclesiastical courts pronounced decrees of divorce *à vinculo matrimonii* only where such marriage was void initially, as by reason of consanguinity; marriage could not be dissolved for supervenient causes, as adultery, without recourse to private Acts of Parliament. The grant or refusal of such an Act was

testamentary jurisdiction of County Courts, are further regulated by 21 & 22 Vict. c. 95.

(*a*) 20 & 21 Vict. c. 85, ss. 9, 11; 22 & 23 Vict. c. 61, s. 1.

(*b*) 23 & 24 Vict. c. 144. (*c*) 20 & 21 Vict. c. 85, s. 17.

in practice determined by the House of Lords acting judicially(*a*). Parliamentary divorces are, however, become rare since the erection of the new jurisdiction of the Divorce Court, which has power to pronounce decrees of dissolution of marriage for adultery of a wife, or for incestuous adultery or certain other offences of a husband(*b*). A decree for divorce is a decree *nisi* in the first instance, and is not made absolute until after the expiration of at least three months. During the interval, any person may impugn the decree on the ground that it has been obtained by collusion, or that material facts have not been brought before the Court; and at any time before the final decree the Queen's Proctor may intervene to oppose the divorce, on the ground of collusion(*c*). In suits for dissolution of marriage, any of the parties may insist upon having contested questions of fact tried by jury. In all other cases under the jurisdiction of the Court, it may, in its discretion, direct the trial of questions of fact by jury before one or more of the judges of the court, or may direct issues to be tried in the common law courts, or at assizes(*d*).

A statute of 1858 gives this court jurisdiction to hear applications to the court for decrees declaratory of validity of marriages, and legitimacy of birth; and also decrees declaratory of the rights of persons to be deemed natural-born subjects(*e*).

The Court of Admiralty.—The criminal jurisdiction of this court has been, as we have seen, transferred to other courts, but it retains a civil jurisdiction, which has been materially extended by recent legislation. The court has two jurisdictions,—firstly, as an Instance Court; secondly, as a Prize Court.

The Instance Court has cognizance of maritime causes

(*a*) See as to the course of procedure in the House of Lords in Divorce Causes, Macqueen's 'Appellate Jurisdiction,' p. 463.

(*b*) 20 & 21 Vict. c. 85, s. 17. (*c*) 23 & 24 Vict. c. 144, s. 7.

(*d*) 20 & 21 Vict. c. 85, ss. 28, 36, 40. (*e*) 21 & 22 Vict. c. 93.

arising upon the sea or in parts out of the reach of the common law. The subjects of which the court has jurisdiction have been divided into:—1. Possession or disputes between co-owners or rival claimants as to the possession and employment of ships. 2. Bottomry, or pledges of ships, and, connected therewith, causes of action for repairs, etc., of ships. 3. Wages. 4. Damage. 5. Salvage, towage, etc. This jurisdiction includes matters of wreck and salvage, pilotage, damage to ships by collision, contracts made upon the sea and founded upon maritime consideration, as where a vessel is pledged during a voyage for necessary repairs, and some contracts which, though entered into upon land, are executed entirely at sea, such as agreements for seamen's wages(*a*). The jurisdiction of this court has been extended by several modern statutes. An Act of 1861 (24 Vict. c. 10) extends the jurisdiction of the High Court of Admiralty with respect to claims for damage done by any ship, claims between co-owners of ships registered in England or Wales, and in various other cases.

The procedure of the court has been improved by stat. 3 & 4 Vict. c. 65, which enables the Court to take evidence

(*a*) See as to the modern jurisdiction of the Admiralty Court, 'A Compendious View of the Civil Law and of the Law of the Admiralty,' by Arthur Browne (8vo, Lond. 1802); 'A Treatise on the Jurisdiction of the High Court of Admiralty of England,' by Edwin Edwards (8vo, Lond. 1847); 'The New Practice of the High Court of Admiralty of England,' by Henry Charles Coote (8vo, Lond. 1860).

The jurisdiction of the Lord Admiral "is verie antient, and long before the reigne of Ed. III., as some have supposed, as may appeare by the lawes of Oleron (so called, for that they were made by King Richard I. when he was there), that there had beene then an admirall time out of minde, and by many other antient records in the reignes of Hen. III., Ed. I., and Ed. II., is most manifest." (Co. Litt. 260 a.)

In his treatise on the jurisdiction of the High Court of Admiralty of England (8vo, Lond. 1847, ch. 1), Mr. Edwin Edwards controverts at considerable length the opinions of Sir Henry Spelman and Lambard that the Admiralty Court was first erected in the time of Edward III., and arrives at the conclusion that the court had a more remote origin. He considers it improbable that before the reign of Edward I. there existed any regularly organized tribunal for determination of maritime causes, and is inclined to attribute the establishment of the Admiralty Court to that king.

either *vivâ voce*, or before commissioners (s. 7), and to direct issues or questions of fact arising in any suit before it to be tried by jury at sittings at *nisi prius* in London or Middlesex, or at assizes (s. 11).

The Court is usually assisted by two elder brethren of the Trinity Corporation at the hearing of every suit for collision, and occasionally in suits for salvage. The function of these assessors is to guide the Court by advice only, and their opinion on matters debated before them is, consequently, though influential, not legally binding on the judge. The Trinity Brethren are a corporation incorporated by charter in the reign of Henry VIII., and having, by subsequent charters and Acts of Parliament, important powers with respect to pilots and lighthouses(*a*).

The *Prize Court* is a separate jurisdiction of the Court of Admiralty, to decide all matters and questions concerning prizes which, in time of war in which this country is engaged, are brought into our ports.

The Prize Court is entirely distinct from the Instance Court, both as to its jurisdiction and the principles of law on which it acts. The Instance Court is governed by the Civil Law, the laws of Oleron, and the customs of Admiralty, modified by Statute Law. The Prize Court is to determine according to the course of Admiralty and the law of nations. The end of a Prize Court is,—to suspend the property which is the subject of prize, till condemnation; to restore it if there be not sufficient ground for condemnation; or to condemn it if the goods be really prize.

One of the elementary principles of prize law is, that all prize belongs to the State; in monarchies to the sovereign. When the naval transactions of this country became frequent and important, it became the policy of the Crown to bestow this kind of property on the captors. The interest in prizes has been given to the captors, sometimes by statute, and sometimes by Royal proclamation. By the

(*a*) Stowe, 'Survey of London,' vol. ii. book 5, ch. 18; Coote, 'Admiralty Practice,' 59.

Prize Act of 1707, the whole benefit of prizes taken in the war in which this country was then engaged, was transferred from the Crown to the captors(*a*). By proclamation in 1854, the Queen directed that the net proceeds of captures by her ships of war, during the war then being carried on with Russia, should be for the entire benefit of the captors(*b*). The Admiralty was always invested with the power of distributing the captured property, from the earliest times. As the jurisdiction of the Admiralty was necessarily dormant in times of peace, the ancient usage was to revive it in time of war by special commission from the Crown; but since the reign of Elizabeth no such commission has been considered necessary(*c*).

Particular courts are established in all the maritime countries of Europe, for the decision of questions of the lawfulness of prizes, for these are questions which belong entirely to the law of nations, and not to municipal law. In cases of property which, in time of war between our own nation and another(*d*), is taken at sea and brought into our territory, the Court of Admiralty has jurisdiction as a Prize Court, to determine whether the property is lawful prize. The Court has also jurisdiction as to English

(*a*) 6 Anne, c. 13. Earlier Acts recognizing the interest of captors in prizes are, 13 Car. II. c. 9, s. 7, and 4 Will. & M. c. 25. By various Acts passed during the American war, the sole interest in lawful prizes was to be given to the captors, in such shares and proportions as the Crown might direct. (See 22 Geo. III. c. 15.)

(*b*) See this proclamation recited in the Naval Pay and Prize Act, 1854 (17 Vict. c. 19), which provides for the application and distribution of the proceeds of ships condemned as prize of war, pirates, slavers, or otherwise, wherever by Act of Parliament, or by Royal proclamation, the proceeds are distributable among the captors.

(*c*) Edwards's 'Admiralty Jurisdiction,' ch. 9; 2 Browne's 'Civil Law,' ch. 6.

(*d*) Blackstone says that the jurisdiction of the Prize Court extends to questions of prize between two other nations. Dr. Browne observes that this is absolutely false if it be intended of two nations at war with each other, with both of which we are at peace; and that for a neutral to permit the condemnation of the property of one belligerent to another would be an act of hostility. Prizes may, however, be brought into neutral ports to sell them. (Browne, vol. ii. ch. 6; see also 1 Kent's Commentaries, 358.)

vessels recaptured from the enemy, to determine whether they belong to the captors or the original owners (*a*). The same court has also, by the statute 3 & 4 Vict. c. 65, jurisdiction to decide such questions of *booty of war* taken by land forces as are referred to it by the Privy Council.

The Court of Bankruptcy.—A bankrupt is a debtor whose property is distributable by compulsory process of law among his creditors. The earliest English statute on the subject is 34 & 35 Hen. VIII. c. 4, against such persons "as do make bankrupt." This Act was mainly directed against traders who acquired the goods and merchandise of others, and then fled to foreign countries, or lived in extravagance, and eluded or defrauded their creditors. The bankrupt law was formerly very severe against bankrupts (*b*), but the modern laws of bankruptcy regard the principles of humanity to the debtor as well as of justice to the creditors; for while the latter are entitled to a distribution of the debtor's estate, the debtor, except in certain cases of fraud or misconduct, receives in return for the surrender of his estate, exemptions from further liability for the debts.

Until very recently, the only persons who could be made bankrupt were *traders*. The definition of the word "trader" depended on various statutes and judicial decisions, which declared whether persons following various occupations were to be deemed traders within the meaning of the bankruptcy laws. A trader might become bankrupt by various acts, voluntary or involuntary, which were similarly defined. The general object of the bankruptcy laws was to enforce a complete discovery and equitable distribution of the property and effects of the bankrupt trader, and to confer upon

(*a*) Edwards, ch. 9.

(*b*) By 21 Jac. I. c. 19, s. 7, a bankrupt who fraudulently conceals his goods, "or that cannot make it appear unto the said Commissioners that he or she hath sustained some casual loss whereby he or she is disabled to pay what he or she then owed," is liable, if convicted for such offence, to be "set upon the pillory in some public place for the space of two hours, and have *one of his or her ears nailed to the pillory and cut off*."

him thereupon security from imprisonment for and absolute discharge from all debts provable under his bankruptcy. After notice in the 'London Gazette,' the Court might hear the application of the bankrupt for discharge, and creditors opposing it; and the Court having regard to the conformity of the bankrupt to the laws relating to bankruptcy, and to his conduct as well before as after his bankruptcy, decided respecting objections against allowing him a certificate for his discharge. The certificate might be granted, refused, suspended, or granted upon conditions.

This system of relief of debtors extended, as has been said, only to traders. The position of insolvent persons not comprised within that description was one of great hardship until the year 1813, when a statute(*a*) was passed, which for the first time established a regular system for the relief of insolvent debtors. This Act was followed by many others, and the law on the subject was consolidated by a statute of the present reign(*b*), which established a system of relief in the *Court for the Relief of Insolvent Debtors*, for the benefit of debtors actually imprisoned. Such persons were enabled to petition the Court for their discharge, or a similar petition might be presented by persons interested in having the debtor's estate distributed. In due course, after such petition, the Court proceeded to make an order, vesting the debtor's estate in assignees, who thereupon took possession of it. The debtor was required to render an account of all his property and debts. The Court had power to order the property to be collected and applied for the benefit of the creditors, and after due notice and hearing of creditors, to order the immediate discharge of the insolvent, or to postpone it for a limited period for various offences. The protection of the Court of Insolvency was however less extensive than that given by the Court of Bankruptcy, and did not amount to a total discharge of the insolvent from all debts provable under his insolvency, but merely protected him from further process on account

(*a*) 53 Geo. III. c. 102. (*b*) 1 & 2 Vict. c. 110.

of such debts without leave of the Court. If the insolvent afterwards were in a condition to make a payment towards the discharge of them, or died, leaving assets available for the purpose, the Court might subsequently permit execution to be taken out upon judgment against the after-acquired property.

The law of Bankruptcy and Insolvency has been materially changed by a statute of 1861, by which the jurisdiction of the Insolvent Debtors' Court is vested in the Court of Bankruptcy. The County Courts have the same jurisdiction as the District Courts of Bankruptcy, and the jurisdiction of the latter, as the offices of the commissioners in them become vacant, is to be gradually transferred to the County Courts. The Insolvent Debtors' Court is abolished, except as to business pending in that court when the Act came into operation(*a*).

The Court of Appeal in Chancery is the Court of Appeal in Bankruptcy, as it was previously to the passing of this Act, and every decision of the London and district courts of Bankruptcy, or of a county court judge in Bankruptcy, is subject to review in that Appeal Court(*b*).

The distinction above adverted to between traders and non-traders is abolished, and all debtors, whether traders or not, are subject to the provisions of the Act. The following are the principal cases in which a person may be made bankrupt. A non-trader absenting himself from the realm, or conveying his property to defeat his creditors, may be made bankrupt after notice; so may a trader or non-trader, duly declaring his inability to meet his engagements; so may a trader, suffering his goods to be taken in execution for debts beyond a certain amount; so may a trader or non-trader, after default of payment of judgment debts beyond a certain amount, or of money payable under decrees and orders in Equity, Bankruptcy, Insolvency, or Lunacy(*c*).

(*a*) 24 & 25 Vict. c. 134, ss. 1, 3, 4, 19, 23.
(*b*) *Ibid.* s. 66.
(*c*) *Ibid.* ss. 69-77.

The petition for adjudication in bankruptcy may proceed either from the debtor or from the creditors, and is to be prosecuted generally in the district where the debtor resides. Where the debts do not exceed £300, a petitioning debtor not resident in London must petition in the proper county court(*a*).

After adjudication of bankruptcy, it is the duty of an officer, called the official assignee, to take possession of the bankrupt's estate, until assignees are appointed by the creditors, when it vests in them, and the official assignee is devested. The Act provides that meetings of the creditors shall be convened for the purpose of determining, *inter alia*, whether the proceedings in bankruptcy shall proceed, or the estate be administered under a deed of arrangement, composition, or otherwise; and the Court has power to confirm and give effect to the resolutions of such meetings, and to annul the bankruptcy, if requisite(*b*).

If the bankruptcy proceed, the bankrupt must, previously to his last examination and application for discharge, render a statement of his accounts. The Court may suspend or refuse the discharge for various specified acts of misconduct or misdemeanour. The order of discharge operates, with some few exceptions, as a complete discharge from all debts and demands provable under the bankruptcy(*c*).

County Courts.—We have already referred to the ancient constitution of the Shyremotes, or County Courts, which formed an essential part of the Anglo-Saxon judicature, and which were continued with diminished authority after the Norman Conquest(*d*).

These ancient county courts are now almost entirely superseded by the county courts established under the authority of an Act of Parliament of 1846. That Act recites that the procedure, under the ancient jurisdiction of

(*a*) 24 & 25 Vict. c. 134, ss. 86–94.
(*b*) *Ibid.* ss. 108, 116, 117, 185–191.
(*c*) *Ibid.* ss. 141, 159.
(*d*) *Ante*, p. 312.

the county courts, is dilatory and expensive, and provides that counties may be by Order in Council divided into districts, in order that a county court may be held in each for the recovery of small debts. The Act also enumerates in schedules a very large number of courts which have been constituted by Acts of Parliament from time to time for the recovery of small debts in various towns of England, and enables the Crown to order that such local courts shall be held as county courts(*a*).

The jurisdiction of these courts has been regulated by various subsequent statutes, and extends to the recovery of any debt or demand not exceeding £50. Actions in which the title to lands, hereditaments, tolls, or franchises, may come in question, and actions for malicious prosecution, libel, slander, criminal conversation, seduction, or breach of promise of marriage, are generally excluded from the jurisdiction of these courts(*b*); but with respect to all actions which may be brought in any superior court of common law, they may have jurisdiction by consent of both parties(*c*).

The county courts are held once a month at the least, and in many places much more frequently. If a claim exceed £5, either plaintiff or defendant may demand a jury; and if the claim do not exceed £5, the judge may grant a jury; otherwise the judge determines questions of fact as well as of law. The judge has power of ordering debts to be paid by instalments, and may punish by imprisonment in certain cases, as those of fraudulent concealment of property, and wilful default.

A suit in the county court commences by *plaint*, which is entered with the registrar of the court, and states the names of the plaintiff and defendant, and the "substance

(*a*) 9 & 10 Vict. c. 95. By 21 & 22 Vict. c. 74, provision is made for rearrangement of the districts of the county court judges, from time to time, by the Lord Chancellor, and it is provided that until Parliament otherwise directs, the number of those judges shall not exceed sixty.

(*b*) 9 & 10 Vict. c. 95, s. 58. (*c*) 19 & 20 Vict. c. 108, s. 23.

of the action." The defendant is not required to enter into any pleading, except that where he claims any set-off to the plaintiff's debt, or relies on the defence of infancy, coverture, the Statute of Limitations, or discharge under the insolvency or bankruptcy statutes, the plaintiff is entitled to notice of such special defence(*a*).

In actions for amounts above £20, an appeal lies from the county court judge to the courts of Westminster in matters of law, and questions of reception or rejection of evidence, but not in questions of fact. The judicature of the County Court judges in testamentary matters and in bankruptcy has been referred to in a previous part of this chapter.

Courts of Peculiar Jurisdiction.—Besides the inferior courts which belong to a general system of judicature, there are some others, of which the jurisdiction is isolated, and confined to particular places. These peculiar jurisdictions exist either by prescription, royal grants, or particular Acts of Parliament. The grant by the Crown of separate courts is very ancient. William the Conqueror granted to some of the more favoured Norman barons peculiar and exclusive, or, as they were afterwards called, palatine jurisdictions, like those which had been exercised by the Anglo-Saxon *subreguli*, or viceroys(*b*). A statute of Henry VIII. (27 Henry VIII. c. 24) recites that "divers of the most ancient prerogatives and authorities of justice appertaining to the Imperial Crown of this realm, have been severed and taken from the same by sundry gifts of the King's most noble progenitors, kings of this realm, to the great diminution and detriment of the royal estate of the same, and to the hindrance and great delay of justice." The Act proceeds to take away from all private persons the right to pardon crimes, and the right to appoint justices of assize, gaol delivery, or of the peace. The Act provides that

(*a*) 9 & 10 Vict. c. 95, s. 76.

(*b*) 1 Spence, 'Equitable Jurisdiction,' 94.

judicial writs and indictments may be made in counties palatine and other liberties in the name of the King, but retains the jurisdiction of the counties palatine, and the customary rights which various cities and boroughs then enjoyed to have justices of their own.

Many of the ancient peculiar jurisdictions have been from time to time abolished by Acts of Parliament. The Act just referred to, establishing new county courts, provides that a multitude of local courts which have been instituted by local Acts of Parliament, shall be held as county courts upon the new system. Several local jurisdictions still continue, however, unabrogated by statutes, and of several the powers have been enlarged by modern Acts of Parliament. It is not intended here to enumerate the whole of these peculiar jurisdictions, but briefly to refer to some of the more important of them.

The Court of the Duchy Chamber of Lancaster is a special jurisdiction held before the chancellor of the duchy or his deputy, concerning all matters of equity relating to lands held of the Crown in right of the duchy of Lancaster. The proceedings in this court are similar to those on the equity side of the Court of Chancery. This court of the Duchy Chamber is distinct from that of the County Palatine of Lancaster(*a*).

The *courts of the counties palatine* of Lancaster and Durham have cognizance of pleas in matters both of law and equity. A *county palatine* is a Royal Fee, *Feodum Regale,* held by an earl who is seised of the whole county as a feudal earldom. The peculiar jurisdiction of the ancient palatinate of Chester having been abolished, there remain now only those of Lancaster and Durham; the former a lay fee, and the latter formerly an ecclesiastical fee belonging to the Bishop of Durham, who held this feudal earldom. But by a statute of 1836, the palatine jurisdiction and *jura regalia* of the Bishop of Durham were separated from the bishopric and vested in the Crown; the

(*a*) 3 Blackstone, 80.

jurisdiction of the courts of this county palatine was, however, continued unaffected by the Act(*a*).

The procedure of the Court of Common Pleas at Lancaster, and of the Court of Common Pleas of Durham, has been by several statutes assimilated to that of the superior courts of law at Westminster. An appeal lies from these courts to the Queen's Bench(*b*). The ordinary jurisdiction of the *Chancery* of Lancaster is similar to that of the High Court of Chancery, and is exclusive where both the subject of suit and the residence of the parties litigant is within the county palatine. The statutory jurisdiction of the Chancery of Lancaster arises principally under two Acts of Parliament of the present reign, which confer a jurisdiction similar to that of the High Court of Chancery, under various Acts giving the latter statutory jurisdiction(*c*). The Lords Justices of the Court of Appeal in Chancery and the Chancellor of the duchy, form the Court of Appeal in Chancery of the County Palatine.

The Chancery of Durham has also a jurisdiction similar to that of the High Court of Chancery; in matters of equitable cognizance arising with the local jurisdiction, the Chancery of Durham has a jurisdiction concurrent with that of the High Court of Chancery. The Chancellor of the Chancery of Durham was, before the palatine jurisdic-

(*a*) 'The Practice of the Court of Chancery of the County Palatine of Durham, by a Solicitor of that Court,' (Sunderland, 1807), p. 1; 6 Will. IV. c. 19.

(*b*) As to the Court of Common Pleas at Lancaster, see 18 & 19 Vict. c. 45, "An Act for further assimilating the Practice in the County Palatine of Lancaster to that of other Counties, with respect to the Trial of Issues from the Superior Courts at Westminster;" as to that of Durham, 2 & 3 Vict. c. 16, "An Act for improving the Practice and Procedure of the Court of Pleas of the County Palatine of Durham and Sadberge;" and as to both, the Common Law Procedure Act of 1854, ss. 100–2.

(*c*) 13 & 14 Vict. c. 43; 17 & 18 Vict. c. 82; Winstanley's 'Chancery of the County Palatine of Lancaster,' ch. 1. The county of Lancaster was first created a Palatinate in 25 Edw. III., by letters-patent, which created the dukedom, and granted to the duke *jura regalia* for his life. (*Ibid.*; 1 Blackstone, 117.)

tion was transferred to the Crown, appointed by the bishop, or, on a vacancy of the see, by the Crown(*a*).

The Stannary Courts of Devonshire and Cornwall were first granted to the tinners of those counties by charters of King Edward I., which are recited in a statute of 16 Car. I. c. 15, which defines the jurisdiction of those courts. The legal and equitable jurisdictions of the stannaries of Cornwall have been consolidated by statute 6 & 7 Will. IV. c. 106, which creates for all those stannaries one court, which exercises original jurisdiction as to all matters relating to mines of tin and all other metals within the county. From the decisions of the Vice-Warden of this court there is an appeal to the Lord Warden, assisted by three or more members of the judicial committee of the Privy Council, and an ultimate appeal to the House of Lords.

The equity side of the Court of the Vice-Warden entertains suits for contribution by persons liable for the expenses of working mines, by creditors having claims against mines, and for accounts between persons interested in mines. On the common law side of the court there is a jurisdiction for the summary prosecution of actions for debts or damages, not exceeding fifty pounds, whether founded on tort or contract(*b*).

There are several courts of the City of London, of which the chief are the Court of Hustings and the Lord Mayor's Court. The Hustings is the supreme court of London(*c*), and has jurisdiction of all real and mixed actions, except ejectments, but not in personal actions, except by way of appeal from the Sheriffs' Courts. The Lord Mayor's Court is a Court both of Law and Equity; under the former jurisdiction it has cognizance of all personal and mixed actions

(*a*) 'The Practice of the Court of Chancery of Durham,' (Sunderland, 1807,) p. 8.

(*b*) 18 & 19 Vict. c. 32.

(*c*) Spelman, Glossarium, sub voce "Hustingum," where the word Hustings is derived from the two Saxon words,—*hus*, a house, and *thing*, a thing, cause, or judgment,—*domus causarum*.

arising within the City and Liberties of London. The equitable jurisdiction of the Mayor's Court comprehends, besides the ordinary subjects of equitable jurisdiction, some others arising out of the peculiar customs of London(*a*). From this court there is an ultimate appeal to the House of Lords. The Sheriffs' Courts have cognizance of personal actions. The procedure in these latter courts is, by a recent Act of Parliament, 15 & 16 Vict. c. 77, assimilated to that of the new county courts.

The courts of the Universities of Cambridge and Oxford, of the origin and criminal jurisdiction of which we have already spoken, have a jurisdiction, where either of the parties is privileged, over all civil causes, except where the right of freehold is concerned. This civil jurisdiction is exercised by the Vice-Chancellor or Commissary, from whose decision there is an appeal to delegates appointed by the University, and ultimately to delegates appointed by the Crown(*b*).

(*a*) Pulling, 'Treatise on the Laws and Customs of London,' ch. 13.
(*b*) 3 Blackstone, 84. Geldart's 'Civil Law,' 153.

BOOK III.

ADMINISTRATIVE GOVERNMENT.

BOOK III.—ADMINISTRATIVE GOVERNMENT.

CHAPTER I.

DIVISION OF ADMINISTRATIVE OFFICES.

THE consideration of the Government of England in its legislative and judicial capacities having now been concluded, the remaining branch of inquiry respecting our domestic polity—its Administrative Offices—remains to be considered.

At the commencement of this work, the functions of Executive Government were divided into two classes, the Judicial and the Administrative,—the essential attribute of the former being the authority to interpret the laws, and of the latter to discharge those functions of government which do not require for their performance authority to interpret the laws. The Administrative Government, therefore, includes a great variety of institutions, for wherever the execution of the laws requires the intervention of Government, that intervention, so far as it can be exercised without appeal to the judicature, devolves upon the Administrative Government. In order to narrow and methodize the inquiry into this important class of institutions, it will be expedient to make some preliminary observations as to their comparative importance in relation to constitutional principles.

In the first place, it may be remarked that Parliament itself discharges several administrative functions, such as

those discharged by votes which lead to the resignation or removal of the principal ministers of the Crown when they cease to enjoy the support of Parliament, the removal of judges on the joint address of the two Houses, and a general supervision of the Administrative Government exercised by means of questions, motions, and debates in Parliament respecting its acts. These functions of Parliament, however, have been sufficiently considered, and it is not intended to advert to them further.

Of the numerous administrative institutions of the country, the most important for the purpose of the present inquiry are those which are so closely connected with the legislature and the judicature, as to form essential parts of the constitution. There are some other institutions, which, though of great social importance, have no *necessary* connection with the other parts of the constitution, and therefore do not require particular notice. It has been already observed, at the beginning of this Work, that the province of constitutional science is confined to the consideration of the *manner* in which laws ought to be made and executed. Confining our inquiry within the latter province, we see at once that there are many institutions,—for instance, those for the public relief of the poor, and the conveyance of letters by post,—which are not necessary to be here considered. Institutions such as these have no necessary connection with the constitution, for it could exist, and in former times it actually did exist, without them.

The institutions which most concern us are those which are so inherently parts of the constitution, that without them, or without some equivalent for them, the British Government could not be carried on without material change of its form. These institutions have all been originally created by *Royal prerogative*, and not by statute; though in many cases their powers and constitution have, subsequently to their original creation, been modified by statutes.

The central administrative institutions, and some of those

which are local, exercise administrative prerogatives and powers of the Crown: our inquiry will, therefore, properly be directed in the first place to a consideration of those prerogatives and powers of the Crown, and the title to the Crown. We shall next consider the origin and division of the administrative departments generally. Finally, we shall proceed to describe individually those administrative departments of central and local government which are essential parts of the Constitution.

CHAPTER II.

ADMINISTRATIVE PREROGATIVES OF THE CROWN.

PREROGATIVE is defined by Coke to extend "to all powers, preheminencies, and privileges which the law giveth to the Crown;" and he observes that it has been variously called by ancient authors, *libertas* or *privilegium regis*, *droit le roy*, *jus regium*, and *jus regium coronæ* (*a*). Writers on the constitution have frequently used the word 'prerogative' in a restricted sense, confining it to those political powers of the Crown which are not conferred by statute; and in this sense the word will be here employed.

The powers of the Crown exercised with respect to the legislature and judicature, have been considered in the two preceding books. The administrative prerogatives of the Crown which we have here to consider, may be distributed under the following heads:—(1) the Queen's Peace; (2) the Public Defence; (3) Foreign Affairs; (4) Revenue; (5) Trade; (6) Franchises.

I. *The Queen's Peace.*—The Sovereign is, by prerogative, the principal conservator of the peace of the kingdom, and may give authority to any others to see the peace kept (*b*). It is in virtue of this prerogative, and that by which the Sovereign is "fountain of justice," that the country is subject to general and local jurisdictions, each having officers competent to execute their judicial processes

(*a*) Co. Litt. 90 b. (*b*) 1 Blackstone, 349.

and judgments. We have already adverted to the origin of the system of police; the Anglo-Saxon division of the country into counties, or shires, and of counties into hundreds, having their county courts and hundred courts(*a*) respectively. The system of the Anglo-Saxon laws was, to make the county or hundred answerable for crimes committed in them, and to impose the duty of apprehending criminals on all the King's subjects(*b*). This system was, in a great measure, retained after the Conquest. The sheriff, though he lost (as we have seen) a great part of his judicial power, retained his ministerial power, with authority to enforce it by the *posse comitâtus*, which is defined to include all people of the county above fifteen years old and under the degree of a Peer(*c*). A great change, however, was made in the sheriff's office. He ceased to be elected by the people, and was appointed by the Crown(*d*). The object of this change was probably to bring the police of the country under the control of the central authority; but that, notwithstanding the change, the sheriffs frequently neglected the execution of legal processes, or wilfully abused their

(*a*) See *ante*, p. 301.

(*b*) Referring to the military police of the Anglo-Saxons, Sir F. Palgrave says that watch and ward on the King's highway was performed by four men from every hide in the hundred, under the command of a wardreeve, who was personally liable for any act of negligence. ('Rise of English Commonwealth,' p. 200.)

By the Statute of Winchester, 13 Edw. I. stat. 2, counties and hundreds are made answerable for robberies and felonies committed in them.

(*c*) Upon resistance to the execution of process, the sheriff was authorized by the Statute of Westminster the Second, 13 Edw. I. st. 1, c. 39, to go personally to do execution, taking with him the power of the county (*assumpto secum posse comitâtus*).

Besides the county jurisdictions of the sheriffs, there were certain franchises or liberties granted by the Crown, in which the grantees' bailiffs had the same power as the sheriffs' bailiffs in counties. Some of these exclusive jurisdictions still exist. The Statute of Westminster the Second, c. 29, gave the sheriff power to execute writs in a franchise upon default of its bailiff to do so. 3 Edw. I. c. 35, prohibits bailiffs of liberties from attaching persons not subject to their jurisdictions.

(*d*) The ancient election of the sheriffs was restored to the people in 28 Edw. I., but the popular election of sheriffs was subsequently abolished by statute, 12 Rich. II. (2 Coke's Institute, 175.)

powers, is manifest from the numerous statutes passed to correct such abuses.

Besides the more general divisions of the country for the preservation of the *King's peace*, there were, from time to time, special jurisdictions existing by grant from the Crown or by prescription, which had peace officers of their own, and were in some cases exempt from processes in the King's name. In these peculiar jurisdictions, offences were said to be committed, not against the King's peace, but against the peace of him in whose court the offence was tried, as in counties palatine, courts leet, and courts of corporations (*contra pacem domini, contra pacem vicecomitis*, etc.)(*a*). But in the time of Henry VIII., as we have seen, these *jura regalia* were restricted by statute. The old jurisdictions were preserved, but indictments for crimes committed in them, and all processes thereon, were required to be made thenceforth in the King's name.

In modern times, the authority and appointment of officers for the maintenance of the peace are almost entirely regulated by statutes, as will be more fully seen under the head of Municipal Government.

2. *War and Public Defence.*—The Sovereign has the sole power of raising and regulating fleets and armies. The manner in which they are raised and regulated has been already partly discussed, and will be further considered hereafter. The prerogative itself, like other prerogatives of the Crown, has been the occasion of contests with Parliament. Before and long after the Norman Conquest, the lords and landed proprietors in England, as in other states of Europe, were attended by armed vassals and retainers. Every freeman was, by the general law of the land, liable to serve as a soldier at the call of the State; but the vassal was bound to devote himself to the personal defence of his lord in all military expeditions(*b*). Parliament, at a very

(*a*) 1 Blackstone, 118.

(*b*) 1 Spence, 'Equitable Jurisdiction,' 38.

early period of the constitution, found it necessary to impose restrictions on the military retinue of powerful subjects. The statute 7 Edw. I. st. 1, A.D. 1279, enacts that in all Parliaments and other assemblies, every man shall come without force and arms; and the statute recognizes the prerogative of the Crown to forbid arms and all force against the peace of the Crown(*a*). Again, by 2 Edw. III. c. 3, no man, great or small, except the King's attendants and officers, or at peaceable feats of arms, shall go or ride armed by night or day, on pain of forfeiture of their armour, and imprisonment.

The military organization which was established in the time of Edward I. for the purpose of keeping the peace, was founded on the Anglo-Saxon law, improved by the Statute of Winchester, 13 Edw. I. (referred to in a previous page of this chapter), by which every country and hundred was made responsible for felonies committed within them. Sir Francis Palgrave has remarked that this military organization became in process of time converted into a mere police establishment; and the constable, the mailed leader of the militia of the hundred in the reign of Edward I., became a rustic peace-officer before the sixteenth century(*b*).

In 13 Car. I., A.D. 1637, in the great case of ship-money, before all the judges in the Exchequer Chamber, it was agreed to be indisputably a breach of the Royal prerogative to raise troops and naval forces for the public defence. In

(*a*) "The prelates, earls, and barons, and the commonalty of our realm, there assembled on advice on this business, have said that it belongeth to us, and we ought, by our royal seigniory, to forbid straitly arms and all force against our peace at all times that we please." (7 Edw. I. st. 1.)

From Glanville it appears that in the reign of Henry II. the vassals or tenants of a lord were bound to assist him in his private wars. The law in respect of such service appears to have continued the same in the time of Bracton; but the practice was going into disuse, and in less than half a century was adjudged illegal. There are few memorials of private war on an extensive scale in England after the Conquest, except in times of turbulence and civil commotion. (Allen on the Royal Prerogative, ed. 1849, pp. 121, 122.)

(*b*) Rise and Progress of Eng. Com. 201.

all the elaborate arguments of counsel and judges respecting the military powers of the Crown, it was not suggested that Parliament had any control over the forces, except the power of granting or withholding supplies(*a*); but a few years after, A.D. 1642, when the King had been induced to commit the charge of restoring peace in Ireland to the Parliament, the two Houses availed themselves of that circumstance to pass a bill declaring that the power over the militia, and also the command of all forts, castles, and garrisons, should be vested in commissioners in whom they could confide. The King refusing his assent to this bill, the Parliament mustered the militia, and thus commenced the war against Charles I. Upon the Restoration, it was declared by statute 13 Car. II. c. 6, that "the sole supreme government, command, and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength, is, and by the law of England ever was, the undoubted right of his Majesty and his royal predecessors, kings and queens of England; and both or either of the Houses of Parliament cannot nor ought to pretend to the same." And this right of the Crown has never since been disputed.

Closely connected with this right is the sole prerogative of the Crown of making peace and war. This, like all the other great prerogatives of the Crown, is exercised by the advice and upon the responsibility of the officers of State, and subject to the check of Parliamentary censure or impeachment, for the improper commencement, conduct, or conclusion of a war.

The important prerogative of the Crown of declaring war, appears to have been derived from the feudal system. Under the Saxon constitution, this power resided, not in the Sovereign, but in the great council of the nation, the Wittenagemote, and was regarded as inseparable from the allodial condition of its members(*b*). We find also numerous instances, after the establishment of the Norman constitution,

(*a*) 3 State Trials, 827.

(*b*) Millar's 'View of the English Government,' vol. ii. p. 91.

of the King consulting Parliament as to the expediency of declaring war, and of questions of war and peace being determined by Parliament(*a*).

The constitutions of many countries have vested the power of declaring war in their legislative or supreme assemblies. In the Greek and Roman republics, the right of declaring war resided in the people. In the form of government adopted by Sweden in 1772, the right of making war was reserved to the legislative body. The constitution adopted by the United States of America in 1787, declares that the Congress shall have power to declare war(*b*). In the Swiss Confederation, the power of declaring war and concluding treaties of peace, commerce, and alliance, is vested in the Diet(*c*). Those who support the Royal prerogative as it exists in this country, argue that the improper exercise of it is sufficiently checked by apprehension of the censure of Parliament, and the power of Parliament to

(*a*) In 5 Edw. II. ordinances were made restricting the Royal authority in many particulars, and among others, providing that the King, without the assent of his Barons in Parliament, could not make war; but these ordinances were repealed, as prejudicial to the Royal prerogative, in 15 Edw. II. (See Rotuli Parliam. vol. i. p. 282; Parry's Parliaments, 85.)

In 5 Edw. III., A.D. 1331, the restitution of Aquitaine is resolved upon in Parliament, instead of proceeding by process of war with France. (Parry's Parliaments, p. 96.) In 43 Edw. III., A.D. 1369, the advice of Parliament is asked concerning a dispute of the King of England with the King of France, and it is resolved to renew the war. (Parry, p. 131.) In 7 Ric. II., A.D. 1384, with regard to certain articles of peace, the "poor Commons" beg to be discharged from giving any answer, and pray the King to advise with his Council. Being pressed for an answer, the Commons declare "they rather choose peace." (Parry, p. 149.)

Prynne, in his 'Plea for the Lords,' p. 53, cites several instances in the reign of Edward III. in which the King consulted Parliament on questions of peace or war. In 21 Edw. III. the Commons decline to advise as to a war with France, but promise to assent to whatever was determined by agreement of the King and his Lords in the matter. In 28 Edw. III. the Commons submit the whole business of the treaties of peace with France to the order of the King and his nobles. In 36 Edw. III. the Lords only advise the King, touching truce or war with Scotland. (See also Hallam's 'Middle Ages,' ch. 8, part 3.)

(*b*) 1 Kent's 'Commentaries on American Law,' 60, 652.

(*c*) 1 Wheaton, 'Elements of International Law,' 90.

refuse supplies for carrying on the war. But, unfortunately, the appeal of the ministers of the Crown for supplies to carry on the war are usually supported by the argument that, as the war is already declared, it is too late to draw back.

The power of the Crown of granting *letters of marque* may be here referred to, not on account of the practical importance of such grants by the English Crown, for they have been long disused in this country, but because the power in question was formerly among the most important prerogatives of the Crown, and its exercise or abolition by other nations is a matter of great moment with respect to the laws of war. Letters of marque and reprisal are commissions granted by a sovereign power to its subjects, authorizing them to make reprisals on the subjects of other states. Such letters may be granted before war is declared between the two states, as a means of obtaining private redress of injuries by capture of the goods and persons of subjects of the offending state. Also during war, the statute law of this country has frequently authorized the Admiralty to grant to private persons commissions to fit out privateers for the capture of prizes of the hostile country (*a*).

At the conference at Paris, in 1856, of the plenipotentiaries of several of the principal European Powers, it was declared that, as to those Powers (*inter alia*), "privateering is and remains abolished."

3. *Foreign Affairs.*—In this country, the Sovereign is the representative of the people in all negotiations with foreign Powers, and in that capacity has the sole authority of sending ambassadors to foreign states, and receiving ambassadors at home. It is also the prerogative of the Crown to make treaties, leagues, and alliances with foreign states. For it is by the law of nations essential to the validity of a treaty that it be made by the sovereign power, and then it binds the whole community; and in England

(*a*) 1 Kent's 'Commentaries,' 69. 1 Blackstone, 258.

this sovereign power is vested in the Crown(*a*). The exercise of this authority is subject to Parliamentary censure, or impeachment of ministers who advise the conclusion of any treaty which shall be afterwards judged derogatory to the honour or disadvantageous to the interest of the nation. Our history contains numerous instances of the censure by Parliament of ministers of the Crown for misconduct of diplomatic affairs. Thus, in a case already referred to(*b*), so early as the reign of Henry VI., De la Pole, Earl of Suffolk, A.D. 1451, was impeached for making a convention of peace without the assent of the Privy Council. In 1529 the articles against Wolsey in the House of Lords included charges of making treaties, and having conferences with ambassadors, and carrying on diplomatic correspondence, without the King's knowledge(*c*). And to come down to later times, the Earl of Orford was, in 1701, impeached by the Commons in Parliament for advising treaties for dividing the dominions of Spain(*d*).

The power which the English Constitution vests in the Sovereign with respect to international affairs, is in some other countries vested in other political authorities. The Constitution of the United States (article 2, sect. 2) gives the President power, with the advice and consent of the Senate, to make treaties, and to appoint ambassadors and other public ministers, and consuls.

4. *Revenue.*—The royal revenues—including the revenue which the Constitution has vested in the Sovereign for public purposes—are of two kinds, hereditary and statutory; of which the latter are now by far the greatest.

The hereditary revenues again may be considered to be of two kinds:—Firstly, territorial revenues, the profits of lands belonging to the Crown, and profits and services reserved in ancient grants of land by the Crown, or accruing to it by the feudal laws of tenure of lands;—Secondly, cer-

(*a*) 1 Blackstone, ch. 7.
(*b*) 1 State Trials, 374.
(*c*) *Ante*, Bk. I, Ch. X.
(*d*) 14 State Trials, 244.

tain casual revenues accruing to the Crown by prerogatives not directly connected with the tenure of land.

The ancient provisions for public defence were by tenures of land. In grants of land by the Crown after the Norman Conquest, it was customary to reserve various services to the Crown. Some of these services were *in kind*, as knight-services, which required those who held by them to provide men armed for the King's wars. Some of the services were supplies to the Crown for the defence of the kingdom, in lieu of services in kind; again, accessions were made to the Crown lands from time to time by escheats and forfeitures; and there were various casual profits which accrued to the Crown by prerogative. Some of these, as treasure trove, continue to legally belong to the Crown to this day(*a*).

Besides the sources of profit just mentioned, the King had also the profits of his own manors and lands. In 6 Ric. II. the Commons petitioned that the King would live of his own revenues, and that escheats, forfeitures, and other casual profits of the Crown, might be kept to be spent on the care and for the defence of the kingdom(*b*).

The revenues of the Crown above-mentioned were hereditary or prerogative, and not by grant of Parliament. But from very early times, as we have already seen, Parliament granted to the Crown subsidies and other additions to the Royal revenue. A question which has been repeatedly, in various forms, the subject of controversy between the Crown and Parliament, is this—whether, besides the feudal, territorial, and statutory revenues of the Crown above mentioned, it was entitled to any others not authorized by Parliament? We have already referred to some of the ancient statutes declaratory of the illegality of taxation without the consent of Parliament; but the language of this Act was not so comprehensive as to prevent the Crown from subsequently asserting the affirmative of the question just stated. Thus in the reign of James I. the Crown

(*a*) Blackstone, Comm., vol. i. 295; vol. ii. 80.
(*b*) 3 State Trials, 873.

asserted a prerogative right of imposing customs upon imports and exports. In Bates's case—the great case of Impositions, as it has been entitled—the Court of Exchequer held that the Crown had the right to impose duties on foreign merchandise at the ports. In 1610 the House of Commons, alarmed by the judgment in Bates's case, debated this claim of the Crown. Some of the arguments in this debate have been preserved, and display an immense amount of legal and historical research respecting the fiscal prerogatives of the Crown. Coke considered that customs originated by grant of Parliament in 3 Edw. I. Bacon contended that the "Customs" were in their commencement by common law, and not by grant of Parliament, and that they existed previously to the grant of certain customs by grant of Parliament, 3 Edw. I. For this opinion several considerable authorities were cited. It appeared, however, that prerogative impositions at the ports were dormant from the reign of Edward III. to that of Mary. The result of the great debate of 1610, was the presentation by the Commons of their celebrated petition of grievances, praying, among other things, that a law might be made "to declare that all impositions set, or to be set, upon your good people, their goods or merchandises, save only by common assent in Parliament, are and shall be void"(*a*). The King's answer to so much of the petition as regarded impositions, appears to have impliedly recognized the principle for which the Commons contended, for he promised that particular impositions complained of should be discontinued, and assigned as a reason for discontinuing one of the impositions, that "it seemed to breed a jealousy in his loving subjects of a precedent of imposing a payment upon them within the land"(*b*).

This petition was followed, in subsequent Parliaments, by frequent remonstrances of the same kind. In the Petition of Rights, assented to by Charles I. (3 Car. I.), it was

(*a*) See the case of Impositions, 2 State Trials, 371.
(*b*) Parliamentary History, vol. i. p. 1133.

declared that by law no man was compelled to make any loans to the King, nor to contribute to any tax, talliage, aid, or other like charge not set by common consent in Parliament.

The victory of Parliament, in their contest with the House of Stuart respecting taxation by prerogative, was not however complete until 1640. About the year 1634, the notable expedient of bringing money into the Exchequer under the name of *Ship-money*, was contrived. The writs for ship-money was said to be the device of the Attorney-General, Noy, who relied upon old records in the Tower as authorities for raising money for fitting out a navy in times of danger. The earliest writs sent out by the Government of Charles under this authority, to ports and other maritime places, appear to have received but little opposition. But subsequently, ship-money writs were sent throughout the kingdom, and were very generally refused in places both inland and maritime. In 12 Car. I., A.D. 1636, Charles procured from all the judges an opinion in writing, declaring that he might by writ command all subjects to provide ships, with men and munitions, for the defence of the realm. But from this opinion some of the judges subsequently receded, and declared that they had signed it only for conformity. Under ship-money writs for the county of Buckingham, John Hampden was assessed twenty shillings towards providing a ship for his county. On his refusal to pay his assessment and proceedings of *scire facias* in the Exchequer, he demurred that the assessment was illegal. The demurrer was argued at immense length, and with great learning, on both sides. The judges also gave very elaborate opinions, and those of them who were in favour of the legality of the charge cited a vast number of precedents of ship-money writs, principally about the times of Edward I., Edward II., and Edward III. They also critically examined the statute *de tallagio non concedendo*, and other ancient statutes, which prohibited taxation without the consent of Parliament, and maintained

that the words of those statutes did not extend to assessments of ship-money. The judges of the contrary opinion thought the statutes included such charges as ship-money, and that the old precedents of writs for ship-money did not authorize its collection in inland places at least. Finally, judgment was given for the Crown (14 Car. I.). This judgment was the occasion of great debate and conferences of both Houses of Parliament in 16 Car. I., A.D. 1640; and it is observable that Hyde, afterwards Lord Clarendon, whose History of the Rebellion is an elaborate apology for Charles, condemned the proceedings of the Government with respect to ship-money, both in that history and in the debate just mentioned. The statute 16 Car. I. c. 14, A.D. 1640, condemned the proceedings touching ship-money, and vacated all the records and processes concerning it(*a*).

One of the first Acts after the Restoration (12 Car. II. c. 4) was a grant of tonnage and poundage, with words which renewed a part of the former declarations against taxation by prerogative; for it was anxiously recited that "no rates can be imposed on merchandise imported or exported by subjects or aliens, but by common consent of Parliament." After the Revolution of 1688, it was declared by the Bill of Rights, 1 Will. & M. sess. 2, c. 1, "that levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal."

Having now considered the manner in which the revenues of the Crown by taxation have been brought under the control of Parliament, we proceed to consider the manner in which the like control has been extended to the territorial and prerogative revenues of the Crown.

The title of the Crown to lands in England has been traced to times long anterior to the Norman Conquest. The private bocland of the King was distinct from the folc-

(*a*) See "The King against John Hampden, Esq." (3 State Trials, 825.)

land or public property of the State, and descended, not to his successors in the kingdom, but as private property. This distinction continued to a late period among the Anglo-Saxons, but the distinction between the private patrimony of the King and the public property of the State became obliterated when the monarchy ceased to be elective(*a*). William I. took possession of the Royal domains, which were very extensive, and under colour of law seized the lands of those who had taken up arms against him. A large portion of these lands he distributed, the year after the battle of Hastings, among his barons, reserving however considerable domains to himself(*b*).

To the royal territory thus acquired at the Conquest large additions were made from time to time subsequently, partly by the operation of the royal prerogative, and partly under the authority of statutes. After the introduction of feudal tenures, it became a fundamental principle that the King was the original proprietor of all the lands in the kingdom, and that all subjects' lands were held mediately or immediately under grants from him. Among other consequences of this doctrine was this, that Crown lands received great accessions, from time to time, by *escheat*, or reversion of lands of private owners to the Crown, where the tenure became void, either by failure of heirs of the tenant, or by felony committed by him, which operated as a forfeiture of his lands(*c*).

An enormous accession to the landed property of the Crown was made on the suppression of monasteries in the reign of Henry VIII. By the statute 27 Hen. VIII. c. 28, all the smaller monasteries and religious houses having less than two hundred pounds in land were given to the King and his heirs, with all the hereditaments belonging to such houses; also the same provision was made with respect to

(*a*) Allen on the Prerogative, p. 154.

(*b*) Spence, 'Equitable Jurisdiction,' p. 99.

(*c*) See as to feudal tenures, 2 Blackstone, ch. 4 and 5; and an admirable summary of the nature and history of Feuds in this and other countries, in a note by Mr. Butler to Co. Litt. 191 *a*.

all monasteries and abbeys and priories surrendered or suppressed in the year preceding the making that Act. By a later Act, 31 Hen. VIII. c. 13, all lands of monasteries and religious houses theretofore surrendered or suppressed, or which might be so thereafter, were similarly vested in the King and his heirs(*a*).

But while, on the one hand, the royal territory has been increased by the causes just explained, there have been, on the other hand, counteracting causes which have tended to greatly diminish the territory of the Crown. At the present time, the Crown lands are of far less extent than formerly, having been greatly reduced by improvident grants to private subjects. Parliament frequently interposed to restrain such grants, and particularly in the reign of Anne, an Act, 1 Anne, st. 1, c. 7, was passed, by which the grant of Crown lands for longer terms than those prescribed by the Act were declared to be void, and upon all grants certain amounts of rent were required to be reserved(*b*). This Act came too late to prevent the alienation of more than a comparatively small part of the Crown lands, but the alienation had the advantage of rendering the Crown dependent upon a Parliament for supplies(*c*).

(*a*) It has been computed that the value of the property thus acquired by Henry VIII. amounted to £1,600,000 per annum, and the entire value exceeded £30,000,000. (St. John, 'On Land Revenues of the Crown,' 4to, 1787, p. 68, where there is a history of accessions to, and alienations of, Crown lands.)

(*b*) By 39 & 40 Geo. III. c. 88, power is given to the King and his heirs, to grant, sell, give, or devise lands, acquired by gift, or devise, or purchase, out of moneys issued for the privy purse, and not appropriated to any public service.

By 1 & 2 Vict. c. 95, s. 4, the provisions of the above-mentioned statute of Anne, restraining alienation of Crown lands, were extended to Ireland and Scotland.

(*c*) Burnet, speaking of the transactions of the reign of James I., says the Crown had a great revenue all over England, which was all let out upon leases for years, and a small rent was reserved. So most of the great families of the nation were the tenants of the Crown, and a great many boroughs were depending on the states so held. The renewal of these leases brought in fines to the Crown, and to the great officers; besides that, the fear of being denied a renewal kept all in a dependency on the Crown. King James

On the accession of George III., an important change took place with respect to the receipt of the hereditary revenues of the Crown. The revenues of the King's lands, except the duchy of Cornwall, instead of being receivable by the King, were, by statute 1 Geo. III. c. 1, made part of the general public revenue of the kingdom. This transfer was made in consideration of an annuity secured to the King for his life, and was the subject of a special arrangement terminating with his life. Similar arrangements have been made by all the succeeding sovereigns, upon their accession, for their respective lives.

The casual revenues of the Crown have been subject to similar arrangements, by which they now generally form part of the public revenue. Charles II. entered into an arrangement with his Parliament by which numerous sources of revenue to the Crown incident to feudal tenures were abolished; these were profits of wardships, or profits of lands of infant heirs, and liveries or fines for delivery of lands to the heir when he came of age, knight-services, already mentioned, and many others. To compensate Charles for the loss of these revenues, Parliament granted to him and his heirs for ever certain duties of excise and upon imports (12 Car. II. c. 24).

Charles II. applied to his own purposes sums appropriated by Parliament for carrying on the war. This diversion of supplies from their intended purpose was first effectually checked after the Revolution, when Parliament took into its own hands the annual support of the forces, both maritime and military, and a *Civil List* revenue was settled on the King. A distinction was made between the military expenses of the Government, which were considered as extraordinary expenses, and those incurred in the maintenance of the ordinary establishments of the civil govern-

obtained of his Parliament a power of granting, that is, of selling those estates for ever, with the reserve of the old quit-rent; and all the money raised by this was profusely squandered away. (Hist. of his own Times, book 1.)

ment. The revenues applied to the latter were called the Civil List revenues, and were provided for partly from the Crown lands which remained unalienated, and partly from taxes imposed by Parliament for the reign. This Civil List revenue was applied in defraying the expenses of the Royal household and of the privy purse, the maintenance of the royal palaces, the salaries of judges, ministers of the Crown, ambassadors, and other claims, but did not include the interest of the National Debt. A nearly similar arrangement was continued up to the time of George III., who for the first time surrendered the principal hereditary revenues of the Crown, and received in lieu of them a fixed sum allotted by Parliament.

On the accession of George IV., a civil list was settled on the Crown, applicable to the privy purse, salaries, and other expenses, including those of ambassadors, judges, and ministers of the Crown, and of the Royal household. The King also retained the hereditary revenues of Scotland, and some other hereditary and casual revenues. But on the accession of William IV., these were surrendered by the Act 1 Will. IV., c. 25, for the regulation of the Civil List. Another important innovation effected by that Act was the separation of the expenses proper to the Crown, and the maintenance of the Royal household, from other charges, which had previously been included in the Civil List. The Civil List, thus altered, included only the privy purse, salaries, and expenses of the household, special and secret services, and pensions. Salaries and expenses of ministers of the Crown, and judges, were made directly chargeable on the Consolidated Fund, which has been previously described(*a*). The civil list of Queen Victoria was settled by 1 Vict. c. 2. The Act provides that the hereditary revenues are, with the exceptions above mentioned, to be carried to the Consolidated Fund during the life of the Queen, but the rights of her successors are not affected.

Blackstone(*b*) observes, on the modern arrangement of

(*a*) *Ante*, p. 189. (*b*) 1 Blackstone, 336.

the Civil List, that "if we consider how the Crown is impoverished and stripped of all its ancient revenues, so that it must greatly rely on the liberality of Parliament for its necessary support and maintenance, we may perhaps be led to think that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left to form that check upon the Lords and Commons which the founders of our constitution intended. But, on the other hand, it is to be considered that every prince, in the first Parliament after his accession, has, by long usage, a truly royal addition to his hereditary revenue settled upon him for life, and has never any occasion to apply to Parliament for supplies but upon some public necessity of the whole realm(*a*). This restores to him that constitutional independence which, at his first accession, seems, it must be owned, to be wanting."

5. *Trade.*—The ancient prerogative rights of the Crown to regulate trade appear to have been materially different with repect to trade between English subjects at home, the trade of foreigners in this country, and the trade of English subjects abroad.

With respect to the first kind of trade, some early Sovereigns assumed the right of granting to favoured subjects monopolies or sole rights of selling particular commodities. These grants were revived during the reign of Queen Elizabeth, and were carried to an enormous extent; but in the great case of Monopolies, in 44 Eliz., it was decided

(*a*) This remark requires some qualification; for Parliament has on several occasions voted large sums of money in addition to those provided by the Civil List, for the payment of expenses of the Crown, and provision for the Royal Family. In 1769, Lord North communicated a message from the Crown, acquainting the House of Commons that the expenses of the Civil List had exceeded the revenue, and asked for an additional supply to discharge the debt incurred. Lord North communicated a similar message in 1777. On each occasion an additional supply was granted to the Crown. (Macknight, Life of Burke, vol. i. p. 350; vol. ii. p. 166.) Similar additional supplies have been granted by Parliament in more recent times.

that they were contrary to the common law(*a*). In 1610 James I. published his 'Declaration of His Majesty's Pleasure,' and in it declared that monopolies are things against the laws of this realm. The law was afterwards more explicitly declared by the statute 21 James I. c. 3, which recites that this declaration is consonant with the ancient laws of the realm. The Act declares all licences to persons or corporations for sole buying, etc., anything within this realm, or the dominion of Wales, to be void. There are excepted, however, from this declaration letters-patent granted to the first inventors of new manufactures, and some few other letters-patent.

But though English subjects might privately sell to one another by the common law without licence from the Crown, they could not trade in unauthorized fairs or markets; and no fairs or markets could be kept except such as were authorized by licence from the Crown, or ancient prescription(*b*).

The foreign trade with this country appears to have been for a long time after the Conquest principally in the hands of foreigners, and regulated by the King's charters to them. There are many very ancient statutes for the protection of foreign merchants in England. Thus the Magna Charta of Henry III. provides that all merchants, "if they were not openly prohibited before," shall have safe-conduct to come into, tarry, and go out of England. Similar provisions were made with respect to foreign merchants and others (*marchantz alienz et denzeins et touz autres*) by the statute 9 Edw. III. stat. 1, c. 1. Many other statutes of the fourteenth and fifteenth centuries regulate the dealings of foreign merchants in this country, in a manner curiously inconsistent with the modern doctrines of free trade(*c*). There are many Royal charters and grants to foreigners during the same period, giving them various privileges of trading in

(*a*) 11 Co. Rep. 84. (*b*) 1 Blackstone, 274.

(*c*) *E. g.*, 5 Hen. IV. c. 9, money taken by merchants aliens for their merchandise, is to be employed on the commodities of this realm. Such

this country. The English do not appear to have engaged in foreign trade until about the time of Edward III., when licences were given to the inhabitants of various English towns to engage in foreign fisheries(*b*).

The principal exports from England were for a long time regulated by the Royal prerogative and statutes relating to the "staple." Staple commodities included wool, lead, and tin, and were those for the sale of which various marts or staples were exclusively appointed. This was done with a view of accommodating foreign merchants, and facilitating the collection of duties. The staples were erected by Royal prerogative, until they were abolished by statute 2 Edw. III. c. 9, which provides "that the staple beyond the sea, and on this side, ordained by kings in times past, and the pains thereupon provided, shall cease; and that all merchants, strangers and privy (*aliens et privées*), may go and come with their merchandise in England after the tenour of the Great Charter." But staples were re-erected by Parliament, by a later statute of the same reign (*Statutum de Stapulis*, 27 Edw. III. stat. 2), which names several towns at which the staple may be held, and provides that all persons may buy staple goods there; enables merchants strangers to transport such goods, but makes it felony for Englishmen, Welshmen, and Irishmen to export them. In the time of Henry IV. it was provided by Parliament that the staple should be entirely at Calais(*a*). After the loss of Calais in Mary's reign the staple fell into disuse.

The practice of erecting corporations by the Crown for conducting foreign trade which had for some time existed, became thenceforward a principal means of carrying on that trade. Among these corporations were the "mer-

merchants are to sell their merchandise within a quarter of a year after their coming into the kingdom; and one alien shall not sell to another. Hosts are to be assigned, with whom only the merchants aliens are to dwell. See, to a similar effect, 18 Hen. VI. c. 4, and 3 Hen. VII. c. 8.

(*a*) East India Co. *v.* Sandys, 10 State Trials, 475.

(*b*) See 2 Hen. V. stat. 2, c. 6.

chant adventurers," licensed by letters-patent of Henry IV., V., and VI. to trade to Holland and adjoining countries, the Russian Company erected by Philip and Mary, and the East India Company erected by Queen Elizabeth(*a*). These companies enjoyed by their charters various exclusive privileges, the validity of which was seriously called into question in the great "case of Monopolies"—the East India Company *v.* Sandys, in 36 Charles II., A.D. 1684. In that case the constitutional powers of the Crown with respect to inland and foreign trade were very elaborately discussed. The judges held that it was an inherent prerogative of the Crown that none should trade with foreigners without the King's licence; that the Statute of Monopolies of James I., above referred to, did not extend to the case of such trade with foreigners; that the Crown might lawfully grant to the East India Company an exclusive right of such trade; and that the Company might maintain an action against a person trading to the East Indies without their licence. It was agreed, however, that the clauses in the grants to the Company, imposing penalties and forfeitures on persons invading their privileges, were invalid(*b*).

The judgment in this case was partly founded on the Royal prerogative of prohibiting subjects from going beyond the seas, and of recalling them at the pleasure of the Crown. The writ of *ne exeat regno*, which is founded on this prerogative, and similar writs to restrain the departure of subjects out of the kingdom, have an ancient origin; but it has been doubted whether the power exercised by

(*a*) See East India Co. *v.* Sandys, 10 State Trials, 371.

(*b*) 10 State Trials, 371. The defendant pleaded the statute 18 Edw. III. stat. 2, c. 3, whereby it is enacted "that the sea be open to all manner of merchants, to pass with their merchandise when it shall please them." The judges put a narrow construction on this enactment, limiting its operation to the trade in wool, which is referred to in a previous clause.

It was agreed in this case that the King had a prerogative to prohibit trade with other countries in emergencies of war and plague. With respect to the latter prerogative, it may be observed that the laws of Quarantine are now regulated by statute. (See 4 Blackstone, 171.)

these writs be not a usurpation, and unknown to the common law. The writ was originally designed solely for political purposes, but has long ceased to be applied to any other purpose than that of restraining debtors from evading claims against them by quitting the kingdom (*a*).

The exclusive powers given to the East India Company were upheld by the Crown by prohibitions restraining the sailing of ships trading to the East Indies without the Company's licence (*b*). In 1693, the company obtained a new charter, with exclusive privileges, but in the same year the House of Commons questioned the validity of this charter, and resolved "that it is the right of all Englishmen to trade to the East Indies, or any part of the world, unless prohibited by Act of Parliament." In 1698, a distinct company was, by 9 & 10 Will. III. c. 44, authorized to be incorporated, with a right to enjoy the whole and sole traffic to the East Indies.

The assumed power of the Crown to grant monopolies of foreign trade does not appear to have been ever re-asserted since the reign of William III., and wherever such monopolies have since been created, they have been authorized by Acts of Parliament. The legislature has also created or recognized numerous other privileges which are in the nature of monopolies, as those of copyright of books, designs, and various works of art, and rights under letters-patent of inventions, which are recognized by the statute of James I. above cited.

(*a*) The right of the Crown to prohibit subjects from quitting the kingdom in ancient times, appears to have been uncertain, and to have fluctuated considerably. Britton, referring to the state of the law in the reign of Edward I., lays it down, that no great Lord or Knight ought to go beyond the seas without the King's leave. On the other hand, a statute of Richard II. prohibits all persons from going abroad, *except* Lords and other great men of the realm, and notable merchants, and the King's soldiers. (A Brief View of the Writ *ne exeat Regno*, by John Beames: London, 8vo, 1824, part 1.)

By the expired statute 13 Eliz. c. 3, subjects departing the realm without the Queen's licence, and not returning after warning by proclamation, are subjected to forfeiture.

(*b*) 2 Shower's Reports, 302. Sir Thomas Raymond's Reports, 488.

Among the prerogatives of the Crown with respect to trade, may be included those relating to blockade and embargo. With respect to embargoes, or the detention of ships in port by the authority of the Crown, it has been a matter of much controversy whether the prerogative is exclusively of a military kind. A very eminent constitutional writer has expressed an opinion that the King has a prerogative of laying embargoes, not only in times of war or imminent danger of war, but also in times of danger from dearth or any other cause(*a*). But Blackstone is of opinion that a proclamation to lay an embargo in times of peace upon all vessels laden with wheat, though in a time of public scarcity, is contrary to law, and particularly to the statute 22 Car. II. c. 13; and therefore (he adds) the advisers of such a proclamation, and all persons acting under it, found it necessary to be indemnified by a special Act of Parliament, 7 Geo. III. c. 7.

There is one kind of embargo not hostile in its nature, which clearly may be enforced, and that is, when a vessel of war or privateer belonging to a foreign country chases a vessel belonging to an enemy of that country into a neutral port: the neutral State has a right to restrain the pursuing vessel from quitting the port until a certain time shall have elapsed after the departure from the port of the vessel which it might otherwise capture(*b*).

The trade prerogatives of the Crown anciently included the regulation of weights and measures, which, however, have so frequently formed the subject of Parliamentary enactment, that they cannot now be referred to Royal prerogative.

The prerogative of appointing ports or havens or such places only for persons and merchandise to pass into or out of the kingdom as the Sovereign thinks fit, may be properly referred to in this place, though the same prerogative rests partly on a fiscal foundation to secure the revenue from

(*a*) Hargrave's Preface to the State Trials, lii.
(*b*) 1 Kent's 'Commentaries,' lecture 6.

customs, and partly on the military rights of the Crown. By the feudal law, all navigable rivers and havens were computed among the regalia, and were subject to the sovereign of the state. So early as the reign of King John, instances are found of ships seized by king's officers for putting in at a place not a legal port. These legal ports were undoubtedly first assigned by the Crown, since to each of them a court of *port mote* is incident, the jurisdiction of which must flow from Royal prerogative(*a*). The power of appointing ports and quays is now vested by Act of Parliament in the Commissioners of the Treasury(*b*). The erection of beacons, lighthouses, and sea-marks, is another commercial prerogative of the Crown now exercised by the Admiralty and the corporation of the Trinity House.

6. *Franchises and Delegation of the Royal Authority.*—Franchises or liberties are defined to be Royal privileges or branches of the Royal prerogative subsisting in the hands of a subject. They may be held by Royal grant, or by prescription, which presupposes a grant(*c*). It is clear that the Crown cannot delegate powers which it does not itself possess; for instance, the Crown cannot grant penalties and forfeitures contrary to the common right of exemption from imposts not sanctioned by Parliament; but particular rights may be established by custom, in contravention of common right; and therefore a municipal corporation, for instance, may obtain by custom exclusive mercantile privileges which could not be conferred upon it by grant from the Crown. In such cases, says Coke, "Fortior et potentior est vulgaris consuetudo quam regalis concessio"(*d*).

It is doubtful whether there be any powers of the Crown which cannot be delegated, except the power of creating peers. The power of pardoning and the power of receiving ambassadors, have been sometimes considered incommunicable, but both these powers have been, and are constantly,

(*a*) 1 Blackstone, 264.
(*b*) 16 & 17 Vict. c. 107, s. 9.
(*c*) 2 Blackstone, 37.
(*d*) The City of London's case, 8 Rep. 125.

delegated by the Crown. The power of validly signifying the Royal assent to bills in Parliament may be, and constantly is, assigned to commissioners; but, as we have seen, the power is subject to restrictions, and cannot be given except with respect to specified bills, and after they are passed(*a*).

(*a*) With respect to the Royal assent by commission to Bills in Parliament, we have already seen (*ante*, p. 49) that the Crown cannot delegate a general power of assenting to Bills in Parliament, but can only authorize the Royal assent to be given by commission to specified Bills which have been passed by the two Houses.

The power of making Peers appears never to have been delegated, except in the case of the patent granted by Charles I. in 1644 to Lord Herbert, better known as the Earl of Glamorgan. In 1644, Charles I. directed the issue of a patent under the Great Seal, directed to Lord Herbert, Earl of Glamorgan and Marquis of Worcester, containing (among others) the following extraordinary power:—"For persons of generosity, for whom titles of honor are most desirable, we have entrusted you with several patents under our Great Seal, from a Marquis to a Baronet, which we give you full power and authority to date and dispose of without knowing our further pleasure." (See copy of this commission in Sir Harris Nicolas's History of the Orders of Knighthood, vol. ii. p. 46.) It does not appear that the powers of this commission were ever exercised, and Sir H. Nicolas doubts whether it ever passed the Great Seal. After the Restoration, the House of Lords (A.D. 1660) procured the surrender of the patent, it being deemed to be "in prejudice of the peerage." (See an account of the history of this commission, 7 Collectanea Topographica, 190; Sir H. Nicolas's Historic Peerage, ed. by Courthope, tit. "Glamorgan.")

In the case of John Fowke, tried for conspiracy against Warren Hastings, the question was discussed whether the Crown could delegate to the East India Company the power to receive ambassadors. One of the judges held that such power could be delegated, but the other judges refused to decide that point. (20 State Trials, 1077.)

By the statute 27 Hen. c. 24, already referred to (*ante*, Book II. Ch. X.), no person shall have power to pardon treason, felony, etc., but the King shall have the sole power thereof. This power is, however, in many cases delegated, as to the Lords Lieutenants of Ireland, and Governors of the Colonies. Lords Justices of the kingdom, appointed by the King to act as his lieutenants during his absence from the realm, have sometimes been appointed with power to grant pardons for all crimes, as in the case of the Lords Justices of 1719. Their commission was however accompanied by instructions, that this power of pardon was not to be exercised except in cases of necessity, but that in other cases they might reprieve offenders until the Royal pleasure was known in that behalf. (See Rep. to the H. of Commons in 1788, 44 Com. Journal, p. 41.)

The number of franchises is indefinite, and they may be given either to individuals or bodies politic. Among the most important which are founded upon prerogatives already considered, are the franchises of county palatines, of corporations, of holding courts leet, of holding pleas and trying causes, of having cognizance of pleas, which is a still greater liberty, being an exclusive right, so that no other Court shall try causes arising within that jurisdiction; of having a bailiwick or liberty exempt from the sheriff of the county, wherein the grantee alone and his officers are to execute all process(*a*).

The most general delegation by the Crown of its political power is that which has frequently occurred in the Royal appointment of Lords Justices, or other substitutes, in the supreme government during the King's absence from the realm. William the Conqueror appointed *custodes regni* during his absence, and down to recent times similar officers have been frequently appointed by many sovereigns; and such appointments appear to have been by commission under the Great Seal, and not by Parliament, except in one or two special cases. Thus the statute 2 Will. & M. sess. 1, c. 6, enabled the Queen to exercise the government during the King's absence; but this Act was considered expedient, because the Bill of Rights of the preceding year had declared that the Royal power should be exercised by the King solely during the joint lives of him and the Queen(*b*).

But, in general, commissions appointing Lords Justices of the kingdom during the absence of the Sovereign, have been granted by Royal authority only, and not by Parliament. From the precedent of the commission of 1719, which has been closely followed in subsequent commissions, it appears that the commissioners' powers have usually in-

(*a*) 2 Blackstone, 38.

(*b*) By 2 Geo. II. c. 27, it is provided that if the King shall at any time appoint the Queen Consort to be Regent of the kingdom during his absence, the Queen may exercise the office without taking any oath or making any declaration required by law to qualify any other person for the office.

cluded powers of keeping the peace, punishing criminals, summoning, holding, proroguing, and dissolving Parliament, holding privy councils, issuing proclamations, authorizing persons to treat with ambassadors and foreign ministers, and to conclude treaties, conferring benefices, issuing warrants to the Treasury with respect to the Revenue, raising, employing, and commanding the army, executing martial law, giving instructions to the Admiralty, appointing to and discharging from offices in the disposal of the Crown, and granting pardons for all offences. But the commission has been commonly accompanied by instructions requiring the commissioners not to exercise some of the powers granted (particularly those relating to pardon and dissolution of Parliament), without special signification of the Royal pleasure(*a*). The precedents of commissions here referred to do not include authority to assent to bills in Parliament, or to grant peerages.

(*a*) See the report of the committee of the House of Commons, appointed in 1788 to inquire respecting the personal exercise of the Royal authority, *ubi supra*.

CHAPTER III.

THE TITLE OF THE CROWN.

THE *jus coronæ*, or right of succession to the Crown, is generally hereditary according to a course of inheritance, which agrees nearly, but not wholly, with the English feudal law of inheritance of lands. Like estates in land, the Crown will descend lineally to the issue of the reigning sovereign, among whom the males are preferred to the females, and the elder son to the younger. On failure of issue male, the Crown descends to issue female; and among females, the Crown descends to the eldest daughter only and her issue by the rule of primogeniture. This is one of the differences between the inheritance of the Crown and that of lands; for, with respect to the latter, there is no primogeniture among females. Another difference between the inheritance of the Crown and that of land, which formerly existed, was, that in succession to the Crown there was no objection to succession of relations of the half-blood; thus Mary inherited to her half-brother, Edward VI., and Elizabeth to her half-sister Mary (*a*); whereas, until a recent alteration of the law of inheritance by 3 & 4 Will. IV. c. 106, no such inheritance to land held in fee-simple was allowed. That statute also introduced, as it is conceived, another difference in the two kinds of inheritance; for by it a lineal ancestor is capable of being heir to any of his issue, whereas it was a fundamental rule of feudal descents

(*a*) 1 Blackstone, 195.

that inheritances should never ascend; and this rule continues, it is apprehended, with respect to inheritance to the Crown. Hence if the son of a queen regnant became king after the demise of his mother, and died without issue in the lifetime of his father, the father would not inherit the throne of his son; whereas if the owner of land die without issue in the lifetime of his father, the latter, according to the modern law, inherits his son's land. Another difference between the ordinary inheritance and inheritance of the Crown consists in this,—that persons who profess the Popish religion or marry Papists are, by the Bill of Rights, debarred the Crown(*a*).

The preceding observation, that the course of inheritance to the Crown is nearly the same as the course of inheritance according to the English feudal law of inheritance of lands, ought to be coupled with the consideration that the feudal law of inheritance varied at different times, and was different in England from that of other feudal countries. The principal peculiarities distinguishing the feudal law of inheritance of England from that of other countries, were the more rigid exclusion of half-blood and the less rigid exclusion of the female line, and the total exclusion of parents and others in ascending line from succession to fiefs in England. The law of primogeniture, also, was more strict in England than elsewhere; for in other countries, though the eldest son represented the fee as here, some portion of the fief or

(*a*) "All and every person or persons that is, are, and shall be reconciled to or shall hold communion with the see or church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded and be for ever incapable to inherit, possess, or enjoy the crown and government of this realm and Ireland and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same. And in all and every such case or cases, the people of these realms shall be and are hereby absolved of their allegiance, and the said crown and government shall from time to time descend to and be enjoyed by such person or persons being Protestants as should have inherited or enjoyed the same in case the said person or persons so reconciled, holding communion, or professing or marrying as aforesaid were naturally dead." (1 Will. & M. sess. 2, c. 2, s. 9.)

some charge upon it was in many cases secured to the younger sons. In England, also, the feudal law of descent varied somewhat at different times. Thus for a short period *temp.* Henry I., the right of succession in the ascending line prevailed. Again, the law that lineal descendants for the purpose of inheritance *represent* or stand in the place of their ancestors, was not established till after the time of King John; and consequently, on the death of Richard I. without issue, he was succeeded, not by Arthur, the son of his deceased next brother (as would have been the case if the doctrine of representation had then prevailed), but by John, who was a younger surviving brother of Richard(*a*).

The course of inheritance of the Crown has never been completely defined by statutes, and therefore is ascertainable only by reference to usage and the laws of ordinary inheritances. In a statute of Edward III., relating principally to the rights of subjects born out of the kingdom, it is said, "that the children of the Kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after their ancestors"(*b*); but of course this falls far short of a complete rule of inheritance. The statute settling the present title to the Crown, 12 & 13 Will. III. c. 2, limits it (sect. 1) on the death of William III. and Anne without issue, to the Princess Sophia of Hanover, and the "heirs of her body, being Protestants," leaving the words "heirs of her body" to be interpreted by the law.

The course of hereditary succession to the Crown has also been several times interrupted and resettled by Parliament. In a previous chapter we had occasion to refer to the resignation and deposition of Edward II. and Richard II. On the deposition of Edward II., his son Edward III. succeeded according to the ordinary rule of inheritance.

(*a*) See Mr. Hargrave's note to Co. Litt. 191, on the history, literature, and nature of feuds in this and other countries. This note is of high value and interest, as a supplement to Blackstone's admirable account of the feudal law in the second volume of his Commentaries.

(*b*) 25 Ed. III. stat. 2.

The successor of Richard II. was Henry IV., who also claimed to be heir to the Crown, but by a fictitious title. In this reign Parliament exerted a power of resettling the Crown; for by 7 Hen. IV. c. 2, it was enacted, "that the inheritance of the Crown and realms of England and France and all other the King's dominions should be set and remain in the person of our Lord the King and in the heirs of his body issuing." In a similar way, a new course of succession was created by Parliament with respect to Henry VII. and his heirs. The Crown was, by Act of Parliament, entailed to Henry VII. and the heirs of his body; the right of the Crown then being in Elizabeth, eldest daughter of Edward IV.(*a*). In the reign of Henry VIII., Parliament enacted still more extraordinary regulations of the succession to the Crown. An Act, 25 Hen. VIII. c. 12, limited the Crown, in default of heirs male of the King's body, to Elizabeth and her heirs, to the exclusion of Mary. A subsequent statute, 28 Hen. VIII. c. 7, excluded both Mary and Elizabeth from the succession, and contained a remarkable provision, enabling the King, in default of future children, to appoint his successor by his will or letters-patent. Seven years after, Parliament again resettled the succession, this time introducing another remarkable innovation; for in case of the death of the Prince, afterward Edward VI., without issue, the Crown was to descend to Mary upon such conditions as Henry VIII. by letters-patent or by his will should limit; on breach of such conditions the Crown was to go to Elizabeth; on breach by her of conditions similarly limited, the Crown was to go to such persons as the King should direct by will or letters-patent(*b*).

The extraordinary power thus given to the Crown of nominating successors to the throne was never exercised, but it is remarkable as evidence of the authority which Parliament assumes with respect to the Royal title.

(*a*) 4 Coke's Inst. 37.

(*b*) 35 Hen. VIII. c. 1, in the authentic edition of the Statutes of the Realm, vol. iii. p. 955.

At the end of the reign of Charles II. the right of Parliament to alter the succession to the Crown was much debated, on the occasion of the proposal of a bill for excluding the King's presumptive heir, afterwards James II., from the succession. The Bill passed the House of Commons, but it was rejected by the House of Lords(*a*).

At the Revolution of 1688, the two Houses of Parliament declared that James II. had abdicated the government, and that the throne was thereby vacant; and they further resolved that the Royal dignity should be held by William and Mary jointly during their joint lives, and subsequently by the survivor of them, and that the regal power should be exercised by William alone during their joint lives; and prescribed the subsequent course of succession in favour of the issue of Queen Anne, Queen Mary, and William(*b*).

This interruption of the regular succession of the Crown differs in three important respects from all previous instances of such interruption. In the first place, there was no vacancy of the throne by express resignation or decease of the reigning King. In the second place, the judgment of deposition (for the resolutions of 1688 just mentioned amounted to such a judgment) was pronounced by the two Houses of Parliament and not by the Lords in their judicial capacity, as was the case on the deposition of Richard II. and of Edward II. In the third place, the succession

(*a*) Burnet, Hist. of his own Times, A.D. 1679, 1680.

(*b*) By the Bill of Rights, 1 Will. & M. sess. 2, c. 2, s. 2, "The said Lords Spiritual and Temporal and Commons assembled at Westminster do resolve, that William and Mary, Prince and Princess of Orange, be and be declared King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the crown and Royal dignity of the said kingdoms and dominions to them, the said prince and princess, during their lives, and the life of the survivor of them: and that the sole and full exercise of the regal power be only in and executed by the said Prince of Orange in the names of the said prince and princess during their joint lives: and after their decease the said crown and Royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said princess, and for default of such issue to the Princess Anne of Denmark and the heirs of her body, and for default of such issue to the heirs of the body of the said Prince of Orange."

of William III. differed from all other successions to the regal power since the Conquest, in that it rested on no pretence of hereditary right. James II. had no other issue than his daughters Queen Mary and Queen Anne, and the hereditary succession would have stood thus:—Queen Mary and her issue, Queen Anne and her issue; King William and his issue(*a*); but the regal power was, as we have seen, vested by statute in William alone during the joint lives of him and his Queen, and, therefore, clearly his title was Parliamentary and not hereditary.

A fresh limitation of the succession to the throne was made towards the end of the reign of William III. At the Revolution, Parliament had made no limitations beyond those to the issue of Queens Mary and Anne and King William, and as failure of all such issue was anticipated, it was resolved to settle the succession in favour the Princess Sophia, grand-daughter of James I. and the nearest of the ancient blood-royal not incapacitated by profession of the Popish religion. By statute 12 & 13 Will. III. c. 2, the remainder of the Crown expectant on the death of King William and Queen Anne without issue was settled on the Princess Sophia and the "heirs of her body being Protestants." The inheritance thus limited descended to George I., the heir of Princess Sophia, she having died before Queen Anne, and has ever since continued in a regular course of descent.

Besides the alterations of the course of succession to the Crown, Parliament has repeatedly exercised the power of vesting the regal authority, during the infancy or other incapacity of the reigning prince, in others. This power has been most frequently exercised by the appointment of a protector, guardian, or regent, when the heir-apparent of the Crown has been very young. In the judgment of law, the King can never be a minor or under age, and therefore

(*a*) 1 Blackstone, 216. William was the grandson of Charles I., and the nephew, as well as the son-in-law, of James II., being the son of Mary, his eldest sister.

he has, by common law, no legal guardian (*a*). The Royal authority has however frequently from very ancient times been delegated, with the assent of Parliament, to Regents or to Councils, where the King has been precluded by infancy, or other incapacity, from personal exercise of the Royal authority (*b*). This delegation, with the assent of Parliament, must not, however, be confounded with that referred to in the preceding chapter, which has been effected by the Royal prerogative solely in cases of temporary absence of the Sovereign from England.

Provisions for the exercise of the Royal authority, during the youth of the sovereign, occur in several statutes of later times. These provisions have varied as to their duration, but in modern times it has been usually provided that the guardianship shall cease on the Sovereign attaining the age of eighteen years. Thus the statute 24 Geo. II. c. 24 provided that in case the Crown should descend to any child of the Prince of Wales under the age of eighteen years, the princess dowager should be guardian of such successor and Regent of the kingdom. A somewhat similar provision was made by 5 Geo. III. c. 27, in case of the descent of the Crown to any of the children of George III. under the age of eighteen years. Similarly, by 1 Will. IV. c. 2, it was declared that the Duchess of Kent should be Regent in case our present Queen succeeded to the throne while under the age of eighteen years; and by 3 & 4 Vict. c. 52, Prince Albert was appointed Regent in the like case, with respect to any issue of the Queen.

The powers conferred upon Prince Albert by the last-cited statute included all the Royal powers and prerogatives,

(*a*) Coke (4 Inst. 6) says that Henry VI. sat in Parliament when he was three or four years old, and again in the sixth and eighth years of his reign.

(*b*) A collection of precedents of delegation of the Royal authority, anciently by the King in Parliament, and after the reign of Henry VI. by statutes, is given in the Report to the House of Commons in 1788, on the personal exercise of the Royal authority. (44 Com. Journal, p. 11.)

As to the power of Regents during the absence of the Sovereign, see *ante*, Book III. Ch. II.

except that he could not give the Royal assent to any act altering the Royal succession.

Parliament has similarly intervened to appoint a Regent during the incapacity of the Sovereign by lunacy. This was done in the single case of the insanity of George III., by the appointment of his son, the Prince of Wales (afterwards George IV.), who was by Act of Parliament (51 Geo. III. c. 1) declared Regent, with certain restrictions as to granting peerages and offices, and the Royal assent to any Act altering the Royal succession and Church government.

We have already referred to the manner in which this statute received a fictitious Royal assent(*a*). In the year following, the restrictions just mentioned were removed, partly by lapse of time, and partly by the statute 52 Geo. III. c. 8, and the whole power of the Crown became vested in the Regent.

We have already seen that in cases of absence of the Sovereign from the realm, it has been common to appoint lords justices, or other *custodes regni*, to act as the King's substitutes; and that such appointments have usually been made by the Royal authority only. But such provisions only apply to a contemplated absence. For the contingency of the absence of a future Sovereign at the time of his succession to the throne, provision has been made by Parliament. By 6 Anne, c. 7, certain lords justices were authorized to temporarily administer the government in the case of the absence of that Queen's successor from the realm at the time of her demise, and such lords justices executed their office for some weeks after the death of Queen Anne. The Act cited restrains them from dissolving Parliament without direction from the King or Queen, and from giving the Royal assent to bills for repealing or altering the Act of Uniformity or the Act for Church Government in Scotland. A similar Act was passed at the commencement of the present reign, to provide for

(*a*) *Ante*, p. 50.

the appointment of Lords Justices in the case of the next successor of the Crown being out of the realm at the demise of Queen Victoria(*a*).

In countries where the kingly office is hereditary, some form is generally adopted on the accession of a new king, in which there is a recognition of his title. Under the Norman kings, it appears to have been considered that the date of a reign commenced at *coronation*(*b*). But it is clear that the devolution of the Crown on the death of the King was, for many purposes of law, regarded as instantaneous, and that this doctrine was established very soon after the Conquest. Coke says that it was resolved by all the judges, in 1 Jac. I., that coronation was but a royal ornament and national solemnization of the descent; that by the law of England there can be no interregnum, and that this appears by numerous precedents(*c*).

The ceremonies of coronation are now regulated by the statute 1 Will. & M. st. 1, c. 6, which recites, that by law and ancient usage, the kings and queens have at their coronations taken an oath to maintain the statutes, laws, and customs; and that the oath had been framed in doubtful terms, with relation to ancient laws and constitutions then unknown. The Act proceeds to provide that one uniform

(*a*) 1 Vict. c. 72.

(*b*) Sir Harris Nicolas has shown, by full examination of authorities, that there are weighty reasons for believing that the reigns of the early Kings, from William I. to Richard I., were dated only from their coronation. (The Chronology of History, by Sir Harris Nicolas (Cabinet Cyclopædia), p. 275.)

A chronicler, Henry of Huntingdon, whom he cites, speaking of the absence of Henry II. from England at the death of his predecessor, says, "England was therefore without a king for about six weeks." (Fuit igitur Anglia sine rege quasi sex hebdomadis, nec tamen, Dei gratia preveniente, pace caruit.) Sir H. Nicolas thinks this statement supports the opinion that the interval between the death of one king and the coronation of his successor was, in the eleventh and twelfth centuries, considered an interregnum. It seems possible, however, that the chronicler meant by the expression "England was without a king," merely that there was no king actually in England.

(*c*) Calvin's case, 7 Co. Rep.

oath shall be administered at all future coronations. The oath so established consists of three parts:—1. An obligation to govern the people according to the statutes, laws, and customs of England. 2. To cause law and justice in mercy to be executed. 3. To maintain the laws of God, the Gospel, the Protestant reformed religion, and the rights of the Bishops, Clergy, and Church (*a*).

Having thus noticed the nature of the Royal title, we may proceed to advert briefly to the constitutional effect of hereditary succession to the Crown. Perhaps no subject of human interest has been more debated than the relative merits of different forms of government. In almost every European language are numerous volumes devoted to the controversy, and it is incidentally discussed in innumerable treatises of law, history, and political economy (*b*). Of course, it is not proposed here to survey the whole of this wide field of debate; all that will be attempted will be to state very briefly the principal questions at issue, and the chief arguments affecting it.

These arguments are of two kinds—historical and speculative. With respect to the speculative arguments, which

(*a*) Prynne, in his 'Signal Loyalty and Devotion of God's True Saints and Pious Christians towards their Kings,' etc. (Lond. 1660), has collected numerous forms of coronation of ancient kings in this country, and gives copies of records of the ceremonies used at the coronation of Richard II., etc. See also, as to coronation oath of Richard II., 3 Rotuli Parliamentorum, 417.

From Bracton, it appears that the coronation oath in the time of Henry III. required the King to promise three things,—to do his utmost to preserve peace to the church of God and all Christian people; to forbid crimes and wrongs; in all judgments to observe justice and mercy. (Bracton, lib. iii., c. 9.) At the coronation of Richard I., when he had taken the oath, the Archbishop solemnly adjured him, in the name of God, not to take the Crown unless he were resolved to keep the oath and vows which he had taken. (Somers, 'The Security of Englishmen's Lives,' etc., p. 71.)

(*b*) Bentham, in his 'Constitutional Code,' book i. cap. 17, compares republican and monarchical government; but, as will be shown hereafter, his comparison does not include such a form of monarchy as now exists in England.

draw inferences as to the results of various human motives, it is to be observed that these inferences are probable only, and far less reliable than inferences from history. For example, it has been frequently attempted to be shown by argument from human motives, that all oligarchies and democracies are unstable, and liable to be displaced by monarchies, and that the latter are more stable; but the argument proves too much, for we know historically, that monarchies are not necessarily stable, and that they may be displaced by republics, as well as republics by monarchies.

The comparison of the merits of different forms of government involves several distinct questions, which will be here rather alluded to than adequately discussed. The principal merits of a government are its stability, justice, efficiency, and popularity. As to each of these, a distinct inquiry arises in comparing different forms of government; except where the different kinds of merit depend on each other. These merits are sometimes closely connected,—for example, the popularity of a government is one cause of its stability; but, on the other hand, the connection is not universal, for a government may be unstable from causes independent of its popularity.

The stability of a government is of two kinds: it may resist overthrow by internal disaffection or by external force. In either case, and especially in the former case, the stability depends much more on the popularity of the government than upon its mere form; because a popular government will have the great majority of the people united in its defence, and be therefore stronger to resist overthrow than an unpopular government. Yet the stability of a government is not absolutely independent of its mere form. Monarchical and absolute governments are usually more efficient for military purposes than republics. Hence it was that the Roman republic in times of public danger vested in the consuls, or in a dictator, a temporary despotic power(*a*); hence also, in somewhat similar circumstances,

( ) "The right enjoyed by the Senate of suddenly naming a dictator, with

our own Parliament has given to the executive government great extension of power by suspension of the Habeas Corpus Act, and similar measures. A republican government is subject to this disadvantage also, that during changes of administration the military force is not so completely under the control of the executive body as in a monarchy. A republic is also liable to the danger of the chief magistrate assuming to himself absolute power. That was the end of the only republic which has existed in our own country since the Norman Conquest, and has been the fate of many other republics of ancient or modern times(*a*).

The contests also which take place with respect to the election of the presidents or other chief magistrates of a republic, are causes of instability. For in those contests the nation is divided by a political strife, which is continued beyond the termination of the conflict, and arrays a large minority of the community in opposition to rulers elected by the majority.

a power unrestrained by any law, or of investing consuls with an authority of much the same kind, and the power it at times assumed of making formidable examples of arbitrary justice, were resources of which the republic could not perhaps with safety have been totally deprived." (De Lolme on the Constitution, b. ii. c. 17.)

(*a*) The eminent American Judge Kent, in his 'Commentaries,' lecture xiii., speaking of the President of the United States, says: "If ever the tranquillity of this nation is to be disturbed and its liberties endangered by a struggle for power, it will be upon this very subject of the choice of a President. This is the question that is eventually to test the goodness and try the strength of the constitution; and if we shall be able for half a century hereafter to continue to elect the Chief Magistrate of the Union with discretion, moderation, and integrity, we shall undoubtedly stamp the highest value on our national character, and recommend our republican institutions, if not to the imitation, yet certainly to the esteem and admiration of the more enlightened part of mankind. The experience of ancient and modern Europe has been unfavourable to the practicability of a fair and peaceable popular election of the executive head of a great nation. It has been found impossible to guard the election from the mischiefs of foreign intrigue and domestic turbulence, from violence or corruption; and mankind have generally taken refuge from the evils of popular election in hereditary executives, as being the least evil of the two. The most recent and remarkable change of this kind occurred in France in 1804, when the legislative body changed their elective into an hereditary monarchy, on the avowed ground that the

Another almost entirely distinct inquiry, as to the relative merits of different kinds of government, is that which regards their justice, efficiency, and popularity. The popularity of a government may possibly be the result, not of its justice and efficiency, but of the ignorance of the people, and of successful arts practised by their rulers to keep them in a state of ignorant contentment. But it is obvious that such a state of society must almost always be temporary and exceptional; and therefore the practically important question in this branch of the inquiry is—which kind of government is most likely to produce just and efficient rulers?

Mr. Bentham, in his 'Constitutional Code'(*a*), assumes that under a republican government, the interests of the rulers are identical with those of the people, but in a monarchical government those interests are in a great measure conflicting. In some respects he allows that their interests are identical; for instance, he says it is the interest of the monarch that his subjects should have subsistence and abundance, because they are thereby enabled to contribute to his wealth and power. Similarly, the monarch is generally interested in the security of his people against foreign aggression; but he is not interested, says Mr. Bentham, in securing the people against the misdeeds of his own functionaries.

competition of popular elections led to corruption and violence. And it is a curious fact in European history, that on the first partition of Poland in 1773, when the partitioning Powers thought it expedient to foster and confirm all the defects of its wretched government, they sagaciously demanded of the Polish Diet that the Crown should continue elective."

He adds: "It remains to be seen whether the checks which the constitution has provided against the dangerous propensities of our system will ultimately prove effectual. The election of a Supreme Executive Magistrate for a whole nation affects so many interests, addresses itself so strongly to popular passions, and holds out such powerful temptations to ambition, that it necessarily becomes a strong trial to public virtue, and even hazardous to the public tranquillity."

Within forty years after this passage was written, a presidential election has become the occasion of civil war in the States heretofore constituting the United States of America.

(*a*) Book i. c. 17.

It is quite clear, from the general scope of the work here referred to, that it compares republican government, not with such a limited monarchy as is now established in England, in which the political responsibility is transferred from the Crown to its Ministers, but to a monarchy in which the King has absolute power to retain executive ministers against the declared wish of the nation. And indeed, notwithstanding the multitude of books which have been written upon the theory of government, there is scarcely one which institutes a direct comparison between the peculiar form of monarchical government which exists in England, and a republican government. The comparison instituted by Bentham and similar writers, whether correct or incorrect, may be disregarded here, because it does not affect the actual condition of our constitution.

In a previous chapter we have traced the history of the dependence of the executive ministers of the Crown upon Parliament, and the history of the principle, apparently favourable to absolutism, but in reality a most important means of securing the control of Parliament over the executive power,—that the King can do no wrong. It was shown that this principle, which involves the responsibility of the ministers of the Crown to Parliament, has been recognized from the earliest times of our existing constitution, though it has been disregarded when Parliament was feeble and corrupt. Several Kings, both before and since the Revolution of 1688, have attempted to select ministers as the instruments of their will without reference to the wishes of Parliament. The last monarch who endeavoured to rule in this manner was George III.; but in his reign the principle was firmly re-established after much contest, that the Sovereign cannot retain ministers disapproved of by Parliament. That principle was acted upon (as we have seen) in the reigns of the immediate predecessors of George III.; and though it had been violated by the Tudors and Stuarts, it had prevailed under the earlier kings.

The manner of constituting the executive power in our

government is, therefore, entirely different from that adopted in all other constitutions except those which have adopted the English model. We have, first, a chief ruler whose title accrues, not by particular election but by a prescribed course—that of hereditary succession; and we have executive ministers nominated by him, but subject to removal at the instance of Parliament, where the representatives of the people have by their fiscal powers paramount authority in this respect. It may be asked whether the control of the executive officers, by the representatives of the people, would not be more effectually exercised by direct election of the executive? This is the great argument of those who prefer republican government; but on examination it will be found that the accession to the popular power by this course of direct election is apparent only, and not real.

In the first place, if the executive body be chosen by direct election, it must be so chosen either for a fixed term absolutely, or so that its authority shall be always subject to revocation. In the former alternative, the body chosen for a fixed term absolutely is, during that term, exempt from the constitutional checks which in England control it at every instant. Here the Constitution gives the power of changing the administrative policy immediately upon its ceasing to receive Parliamentary sanction; but an executive chosen for a determinate period, has for the time an authority much more nearly approaching that of oligarchy; for the power of public opinion acts upon such a body the less directly and effectively, the more distant the period when its power is to terminate. The second alternative is that the authority of the elected administrative body shall be always subject to revocation. It is a sufficient answer to this suggestion that such a mode of constituting the executive has never been put in practice in any settled Government. The Romans chose their consuls annually; the United States of America elect their presidents for a fixed number of years; and the practice of other great

republics has been similar in this respect. It is obvious that to render the power of the chief ruler of a republic perpetually revocable would be to aggravate, by their frequency, the evils of those contests for the chief authority in the State which have been always found inseparable from republican governments, and have frequently proved their ruin(*a*).

In a Constitution such as ours, and in a republic, the chief magistrates have entirely different offices. In our Constitution the Sovereign is a moderator between the several political parties in the State, and can gain nothing by siding with either. In a republic there is not, nor can be, such a moderator. The chief magistrate must, by the very terms of his election, represent one party. True, that party may be the majority; but it by no means follows that it should have the sole governing power either executive or legislative; for the minority ought to have its rights protected, even when they conflict with the interests of the majority. In a republic it is all but impossible that the chief ruler shall be impartial; for he comes into office pledged to support the measures of his party, and to bestow on them all his patronage.

Are we to conclude then that the head of the State ought to have little power, and to be of little importance? To speak for a moment metaphorically, there are in the political, as in other kinds of machinery, two sorts of power—moving power and regulating power. Of regulating power a most important share may, as our own history shows, be advantageously entrusted to the head of the State. He convokes Parliament, nominates judges permanently, and political ministers temporarily. These

(*a*) By the constitution of the American United States, art. i. sec. 3, the Senate has sole power to try all impeachments; and by art. ii. sec. 1, the President, Vice-President, and all civil officers of the United States shall be removed from office for a conviction of treason, bribery, or other high crimes and misdemeanors. But there is no practice of compelling the resignation of the administration when its policy ceases to command the approval of Congress.

are only some of his great powers. That the exercise of them is subject to constitutional checks does not destroy their importance. To suppose, as some have done, that the power of an English Sovereign is unimportant, is to take a superficial view of our Constitution. It is clear that the only method of forming an accurate estimate of the importance of that power, is by considering what would be the consequence of abrogating the kingly office while retaining all other existing offices in our government, subject to the same constitutional limitations as at present. The gravity of the consequences which would follow from thus abrogating the kingly office alone, is obviously a just measure of the importance of that office. This being premised, let us consider what would be the consequent relations between the executive government and the legislative. The chief executive officers remaining under the control of Parliament, where shall the power reside of convoking and dissolving Parliament? Shall it be in those ministers who are thus dependent on Parliament, or in Parliament itself? Is it not clear that the result of such a state of things would be either that the ministers would either free themselves from the control of Parliament, as they did after the death of Charles I., or that Parliament would have the power of indefinitely prolonging its own existence, and would take into its own hands the executive power? The result of uniting the executive and legislative powers in the same body—as has been already shown by reference to history, constitutional authorities, and abstract argument—is to subvert the fundamental and essential conditions of good government.

The preceding arguments extend only to this—that they show the advantages of the appointment of the chief magistrate, not by popular or Parliamentary election, but according to an independent method of succession. That succession is in England hereditary; but it is of course possible to devise other methods of succession to the office of chief ruler, without popular or Parliamentary election. Thus, there are instances in which the reigning monarch has had

a power of nominating his successor, such a power was, as we have seen, given by Parliament to Henry VIII. Again, the chief rulers of our own colonies are nominated by the Crown; and therefore those British colonies which have Parliamentary constitutions, possess all the advantages of the English Constitution with respect to the relations of the Legislature and Executive to each other; with this additional advantage, that colonial governors being nominated and subject to recall by a competent authority, the colonies are not subject to the risk, which of course attaches to hereditary succession, of having a chief ruler who is plainly unfit for his office by reason of moral, mental, or physical disqualifications.

It is not therefore contended that hereditary succession is the only title to the Crown by which the particular advantages already considered could be conceivably secured. A principal source of those advantages is, that the title of the chief magistrate accrues by some rule which is certain and precise, which does not involve the evils of an election or disputed succession. These advantages depend therefore, in a great measure, on the succession being undisputed. Thus, whenever the title of the Crown has been seriously in danger, the ordinary constitutional limits of its authority have been exceeded either by the assent of Parliament or arbitrarily. The stability of hereditary monarchical institutions depends in a great measure upon the habitual loyalty of the people to an existing dynasty. But the founder of a new dynasty, like the president of a republic, is always subject to the opposition of an adverse party. Where indeed, as after the Revolution of 1688, a new dynasty is established with the assent of the great majority of the people, the evils of an interrupted succession do not necessarily include a suspension of the control of Parliament over the ministers of the Crown; but it is clear from that and every other instance of changes of dynasty, that the power of Parliament is then most complete when the right of succession is most firmly established.

The arguments *against* hereditary succession are obvious. It is their very obviousness that ought to render us cautious of accepting them without consideration. We may reasonably doubt whether those arguments are conclusive, when we reflect that in our own country, through a long series of dynastic changes and contests, marked by the practical wisdom of the people and their love of rational liberty, they have shown a distinct preference for the principle of hereditary succession.

The most obvious argument against the rule of hereditary succession, is that it has no respect to the fitness or unfitness of the persons designated to the kingly office. This may be admitted. The title to the Crown has frequently devolved upon licentious and tyrannical princes: and we have had several instances of English kings, who beyond all dispute endeavoured to subvert the constitution. We have also had one instance of a king incapacitated by insanity. To admit the reality of these evils is to admit that our kingly government is not absolutely perfect. And when it is argued that such evils are not incident to republican government, we may, in truth, concede that in a republican government, where the election is fairly conducted and the people well educated, they will elect a chief magistrate of whose competence there is reasonable presumption. But even here the manner of designating the chief magistrate is not theoretically perfect. The people may err in their choice; or, which is a by no means uncommon event, the election may fall on a candidate chosen by compromise between powerful political parties. Mr. Bentham asks triumphantly whether it is possible to suppose that a republic would elect a madman for its chief ruler? That they would not knowingly make such an election may be conceded; but neither in a kingdom would a madman be knowingly allowed to succeed to the exercise of the kingly office. If the insanity of George III. had occurred before his accession, a Regent would probably have been appointed by Parliament before he began to reign, and the accident

of the chief magistrate becoming insane after accession to his office, is possible in a republic as well as in a monarchy. In considering the possibility of the title to the Crown devolving on an unfit person, it is important to remember that in cases of obvious incapacity, Parliament has interfered to apply a remedy. In the cases of several Kings incapacitated by non-age, Protectors and Regents have been appointed by Parliament to exercise their powers during their minority; in the case of incapacity by mental alienation, the like provision has been made; and in cases where the Sovereign has, by the persuasion of evil counsellors, violated the constitution, Parliament has remedied the evil by punishment of those counsellors, or where that remedy proved insufficient, by declaring the throne vacant, —a course of which several instances have been cited in the preceding pages.

These appear to be the principal considerations affecting the comparison of republican and limited monarchical government. For their full development, and a more exhaustive treatment of the subject, far more space would be required, and a more direct reference to political controversies, than lies within the scope of this book. The arguments here adduced are mere suggestions for a more complete investigation of the subject. One general observation may however be added, with respect to such an investigation. In order to be satisfactory, it should comprise a careful examination of the causes of the decline and fall of great republics and kingdoms, so far as those causes are connected with their forms of government. The consequences, also, of defects in the constitution of the executive body and the legislature respectively, ought to be carefully distinguished. The neglect of this distinction is a common fallacy in the reasoning of those who argue against hereditary monarchy. They assume that all the misgovernment which happens in a kingdom is due to the constitution of the Executive, and not to the Legislature; or else they assume that the defective constitution of the Legislature is the in-

evitable consequence of kingly government. Yet there is abundant historical proof of the incorrectness of both assumptions. We find in our own history instances in which the Executive has been able and upright while the Legislature was corrupt: such was the case at the commencement of the reign of William III. We have instances, on the other hand, of a corrupt and arbitrary Executive, nobly resisted by an able and honest Legislature: such was the case during parts of the reigns of James I. and Charles I. It is therefore obviously erroneous to attribute the progress or decline of a nation to the election or non-election of its executive rulers solely, without regarding what is even more important—the proper constitution of the legislature; or to assume, without proof, that the defective constitution of the Legislature is a consequence of the non-elective title of the chief magistrate.

CHAPTER IV.

ORIGIN AND DISTRIBUTION OF ADMINISTRATIVE OFFICES.

For the reasons given in the first chapter of this Book, the administrative departments to which we shall principally direct attention are those which form essential parts of the constitution; and these departments have, for the most part, their origin by *prerogative*, and exercise administrative prerogatives of the Crown. The administrative departments which have only *statutory*, and not prerogative powers, are of comparatively recent origin, and have little importance in our inquiry into the principles of the constitution, except so far as they are connected with the more ancient prerogative offices.

The origin of the administrative departments is often obscure, and their earliest constitution and functions are, in several cases, very indistinctly traceable in historical records. The uncertainty as to these particulars arises partly from the circumstance, probably, that the functions of ancient departments of the State were assumed in contemporary documents to be matters of notoriety; and partly from gradual changes in those functions by the Royal authority or otherwise, without any formal written sanction.

It is to be remembered also, that the separation of the administrative from the other functions of government, is a political refinement not likely to occur in the early history of the constitution. It has been shown, in a former chap-

ter, that one important provision of our Constitution for maintaining this separation, is the power given to the Crown of appointing its chief ministers, without the direct control of Parliament; and that, excepting some rare instances, the Houses of Parliament have never claimed a power of nominating the ministers of the executive government(*a*).

The Norman sovereigns, like their Anglo-Saxon predecessors, were advised in the exercise of their prerogatives by a Select Council regularly attendant on the King, and distinct from the Great Council of the nation, though forming part of it. The functions of the permanent council were partly legislative and partly executive; and it was only by very gradual steps that its legislative power became limited. In its executive capacity also, as we have seen in a previous chapter, it exercised great judicial powers, which continue in part to this day.

The Select Council included, besides other members, the *Chief Justiciar*, the *Chancellor*, and the *Treasurer*, who were members *ex officio* (*b*). These three were, under the Norman Kings, the three principal ministers of the Crown for civil affairs, and had both judicial and administrative duties.

The *Chief Justiciar* was the highest minister of the King, was next in rank to the King, and had general jurisdiction of pleas civil and criminal(*c*). He had also administrative powers, both in the Select Council and in the Treasury, where he appears to have had some control over the Treasurer himself, and to have taken part in the keeping and management of the revenue(*d*).

(*a*) *Ante*, Book I. Ch. X.; see p. 242.

Among the exceptional instances, the following may be cited:—In 5 Edw. II. it is resolved in Parliament that the King shall make the Chancellor, Chief Justices, Treasurer, and others, by the advice of Parliament. But in 15 Edw. II. the ordinances of 5 Edw. II. are revoked, and it is enacted that ordinances made concerning the Royal power, or against the estate of the Crown, shall be void. (Parry's 'Parliaments,' pp. 73, 85.)

(*b*) 1 Spence, 'Equitable Jurisdiction,' 329.

(*c*) 1 Spence, 'Equitable Jurisdiction,' 78, 100.

(*d*) Madox, 'History of the Exchequer,' ch. 2.

The first of the articles of accusation against Hubert de Burgh, Earl of

The *Chancellor*, whose office had existed before the Conquest, both in this and in other countries, and who kept the Royal Seal, by which precepts and grants of the Crown were executed, was, in Norman times, usually one of the King's chaplains, and, as we have seen, subordinate to the Chief Justiciar until the jurisdiction of the latter in the *Aula Regia* was distributed among several separate courts. The Chancellor had, at that time, the care of the Royal Signet in the Exchequer, and appears to have usually kept the Great Seal there until about the time of Richard I. or John, when it is supposed that the separation of the Chancery from the Exchequer took place(*a*).

For obvious reasons, the fiscal offices were amongst the administrative offices earliest established. In the reign of William I. a separate board and court existed for matters of revenue upon the model of the Exchequer of Normandy; and a *Treasurer* and other officers were appointed for transacting business relating to the Royal revenue(*b*). The early treasurers, like the chancellors, were for the most part men of the Church expert in the laws of the realm. For some time after the Conquest, the Chief Justiciar performed many of the duties which afterwards pertained to the Treasurer exclusively, and seems to have monopolized all the chief offices in the State, both judicial and administrative; but, about the reign of Stephen, the offices of Chief Justiciary and Treasurer were separate(*c*). About the time of King

Kent, in 23 Hen. III., A.D. 1239, required an account from him of all the revenue of the kingdom for fourteen years next following the death of King John, "from which time he took upon him the keeping and management of the same." De Burgh answered that he was at the time in question Justiciar, and that the officers answerable for the profits of the realm were the Treasurer and Chamberlains, and not the Justiciar. (1 State Trials, 14.)

(*a*) Dialogus de Scaccario, cited in Madox's Hist. of the Exchequer.

(*b*) Dialogus de Scaccario, *ubi supra*.

(*c*) In Co. Litt. 304 b., among others, the name of a prelate who held the office of Treasurer in the reign of Henry I. is given: "Nigellus, Episcopus Eliensis, Hen. I., thesaurarius in temporibus suis, incomparabilem habuit scaccarii scientiam, et de eâdem scripsit optime."

Nigel was also Treasurer in the reign of Stephen, and appears, from the

John, the principal officers of the Exchequer appear to have been the Treasurer and the Chamberlains(*a*). The latter were officers of high dignity, who kept the keys of the Treasury, but their offices, being discharged by deputy, soon became sinecure(*b*). It has sometimes been supposed that there was at one time a Treasurer of the Exchequer distinct from and subordinate to the Lord Treasurer of England; but the two offices (if ever distinct) became united at an early period, and so remained until the nomination of the Lord Treasurer ceased, and the present practice of vesting his powers in several Commissioners of the Treasury was established(*c*).

We have said that the principal ordinary ministers of the Crown for public civil purposes under the Norman kings were, the Chief Justiciar, the Chancellor, and the Treasurer. Besides these, there were the following great officers of state, the High Constable and the Mareschal, who had military duties, and the Seneschal, whose duties were connected with the King's household(*d*).

The *Constable*—*Constabularius Regis* or *Constabularius Angliæ*—seems to have been, both in England and France, (next to the King) the supreme commander of the army, though the exact nature of his duties is involved in obscurity. He had, besides his military duties in time of war, analogous duties in the King's court in times of peace, and judicial powers which, in 13 Ric. II., were regulated by sta-

account of him in Madox, Hist. of the Exch., to have been the first who held that office separately from that of Chief Justiciar.

(*a*) 1 State Trials, 14.

From the Statutum de Scaccario, 51 Hen. III. stat. 5, c. 7, it appears that the Constable, Marshal, and Chamberlains had freehold offices in the Exchequer, which they discharged by deputies.

(*b*) Co. Litt. 105 b.

Besides these Chamberlains of the Exchequer, there were other Chamberlains, as those of the King's Household. (Madox, ch. 2.)

(*c*) See Judgment of Lord Somers, 14 State Trials, 65. Madox, however, appears to be of opinion that Treasurer of the Exchequer was only another name for King's Treasurer. (Hist. of Exchequer, ch. 21.)

(*d*) "Senescallus, idem quod Major domus." (Spelman, Glossarium.)

tute, and included cognizance of contracts touching feats of arms. His office was as old as the time of the Conquest; but on the attainder of Edward, Duke of Buckingham, in 13 Hen. VIII., the hereditary office became extinguished, and since that time high constables have never been appointed except upon mere state occasions, as coronations. The *Marshal—Marescallus*—was next in command. His office also was hereditary, and existed at the time of the Conquest. At that time he had the duty of superintending the discipline of the army, the regulation of the camp, and like duties(*a*). The constitution of the army has been, as we shall see in the chapter on military offices, so entirely changed since the abolition of feudal tenures, that the ancient history of military offices affords no light as to the constitutional principles on which the army is now regulated.

The *Admiralty* is one of the great offices of State which has continued from the Norman period to this day. Spelman says that the office of Admiral existed in Anglo-Saxon times, and he gives a catalogue of admirals from the time of Henry III. Selden and Coke also show that the office existed under the earlier kings of the Norman dynasty(*b*). The admiral then, and long subsequently, was not necessarily the commander of the fleet, but an officer of State who presided over maritime affairs and directed the naval strength of the kingdom. A royal navy, ready at all times for the service of the State, was not, as we shall see hereafter,

(*a*) Madox, Hist. of the Exchequer, ch. 2. Spelman, Glossarium, sub vocibus Constabularius, Marescallus. Grose, Military Antiquities, ch. 7.

(*b*) Spelman, Glossarium, sub voce *Admiralius*; Selden, Notes on Fortescue; Fortescue, De Laudibus Legum Angliæ, ch. 32, Note by Selden; Co. Litt. 260 b.

From the series of Admirals given by Spelman, it would seem that in the reign of Henry III. and again during part of that of Edward I. there was one Admiral of all England; that during part of the reign of Edward I. the office was divided between three—the Admirals of the North, of the South, and of the West; that afterwards there were Admirals of the North and the West only; and occasionally but one Admiral of England until late in the reign of Edward IV., and that after that time there was no division of the Admiralty.

permanently established until the time of the Tudors; but previously to that time the custom was for the King to rely for his naval force on merchant vessels pressed into his service, or ships furnished and fitted out by various counties and towns by virtue of those prerogatives which have been already referred to as the foundation of the ship-money writs; resuscitated in the time of Charles I.(*a*).

The above were all the principal administrative offices which existed at the Conquest, and which have continued, subject to various modifications, to the present time. These offices, to recapitulate them according to their modern designations, are, the Privy Council, the Chancery, the Fiscal Offices, the Naval and Military Offices. With the important exception next to be noticed, the offices just mentioned, and those subordinate to them, are all the offices of the central administrative Government.

The office of the *Secretaries of State*, as principal ministers of the Crown, had a much later origin than the offices hitherto mentioned. The King's principal secretary does not appear to have been included among the great officers of state until the reign of Henry VIII., and his designation of Secretary of State is of still later origin.

Many of the functions now assigned to these officers were formerly discharged by the Chancellor. The Chancery, in its ante-Norman origin, was an office in which the King's grants were made out by clerks under the superintendence of the Chancellor(*b*), who was usually one of the King's chaplains and probably his secretary. In the earliest age of civilized Europe the Chancellor drew up the commands of the Sovereign in writing, and authenticated them by his seal. As civilization proceeded, it became frequently necessary to convey the Royal commands in a less formal manner, and for this purpose recourse was had in England, as in most Continental states, to an officer who obtained the appellation of King's principal secretary.

(*a*) *Ante*, Book III. Ch. II. sect. 4.

(*b*) 1 Spence, 'Equitable Jurisdiction,' 79, and note (c), *ibid.*

The history of the growth of the power of the Secretary of State, and the distribution of it among several distinct departments, will be traced in a future chapter. For the present it is sufficient to observe, that there are now five secretarial departments, viz. for Home Affairs, Foreign Affairs, War, the Colonies, and India respectively.

Recapitulating the administrative offices of the central Government referred to in this chapter, it appears that, notwithstanding their multifarious nature, those which we are here required to consider admit of a simple classification. They are, (1) the Privy Council and departments connected with it; (2) the Secretarial Offices and departments connected with them; (3) the Fiscal Offices; (4) the Naval and Military Offices. The functions exercised in Chancery with respect to Parliamentary writs have been noticed in the first book. The administrative functions of this and some other departments, so far as they are unconnected with other branches of Government, do not appear to be of sufficient constitutional importance to require separate notice here.

Reverting also to the administrative prerogatives of the Crown, enumerated in the second chapter of this Third Book, viz. Public Defence, Foreign Affairs, Revenue, Trade, and Franchises, we observe that all these are subjects of the business distributed among the departments here classified. The Public Defence is under the management partly of the naval and military offices, and partly of Secretaries of State. Foreign affairs are under the management of the Secretary for Foreign Affairs. The Revenue is under the management of the fiscal offices. Trade is under that of a department of the Privy Council. Franchises, municipal and domestic, are partly under the same management, and partly under that of the Home Office. Colonial franchises are under the management of the Colonial Office and departments of the Privy Council.

Before proceeding to consider separately the administrative departments, it will be useful to advert briefly to the great differences which exist in the *constitution* of those departments. Some of them, as the Cabinet, the Treasury, the Admiralty, and the Board of Trade, are constituted as Boards, or Committees, the members of which have, according to the terms in which their offices are created, equal authority; but in these cases usage has destroyed this equality of authority, and the supreme authority in each department is in a Chief Minister: in the Treasury, the First Lord of the Treasury is supreme, as he is also in the Cabinet; in the Admiralty, the First Lord of the Admiralty; and in the Board of Trade, the President of that Board has supreme authority. In another instance, that of the Secretariat of India, there is a Chief Minister, advised by a Board, whose concurrence is requisite to the validity of some few of his acts of office, but not of most of them. In the constitution of other departments again, as those of the Secretaries of State for Home, Foreign, and Colonial Affairs, there is nothing analogous to a Board or Committee; but the Chief Minister, the Secretary, is solely responsible. Lastly, we find in the relations of the Secretariat of War, and the office of the Commander-in-Chief, another diversity of the constitution of public departments. The minister chiefly responsible for the military administration is the Secretary of State for War; yet in many important branches of that administration, the office of the Commander-in-Chief exercises a nearly independent authority. The manner in which these diversities in the constitutions of the administrative departments have arisen, will appear in the subsequent chapters.

CHAPTER V.

THE PRIVY COUNCIL AND ITS COMMITTEES.

THE highest administrative department under the Crown is the Privy Council, of which the legislative and judicial functions have been described in former chapters; and the administrative functions remain here to be considered.

These duties are now in general discharged by committees and select portions of the Privy Council, of which the principal is the Cabinet. The Privy Council at large was formerly the constant council of the Sovereign in all weighty matters of state, but is now rarely assembled altogether; the duties which anciently devolved upon general meetings of the Council being now, for the most part, discharged by the Cabinet, which (as we have seen) consists of those members of the Privy Council who are, from time to time, the principal advisers of the Crown. The history of this change we have already had occasion to consider. Before the distinction between the Cabinet and the Council at large, and the general exclusion of the latter from business of state, were established, the resolutions of the Crown whether as to foreign alliances or the issue of orders and proclamations at home, or other public acts of Government, were not finally taken without the deliberation of the Privy Council, whom the law recognized as the sworn and notorious Councillors of the Crown (*a*).

The business transacted by the Privy Council, so long as

(*a*) 2 Hallam's 'Constitutional History,' p. 535, quarto ed.

it continued to manage the general administrative government, included a large portion of the duties which subsequently were assigned to the Secretaries of State. Thus, it appears that in the 22 Hen. VI. (1443–4), grants which now pass through the office of the Secretary of State were superintended by the Council. Grants were then required to be made upon bill or petition signed by the suitor, and by a Lord of the Council, or "other person about the King." In matters relating to justice such bills were sent to the Council to be referred to the proper Courts; petitions for matters of grace were either referred to the Council for advice, or if granted by the King without such reference were delivered to the King's Secretary to prepare letters accordingly directed under the signet to the Keeper of the Privy Seal, and from thence, under the Privy Seal, to the Chancellor. But if the Keeper of the Privy Seal, upon receipt of the letters under the signet, "should think the matter to be of great charge, he is to have recourse to the Lords of the Council, and open to them the matter, to the intent the King may be advertised thereof before it passes"(*a*).

In the course of time, the Council was, for the more convenient dispatch of public business, divided into committees, which transacted much business which now devolves on separate public departments. Thus in 1620–1, there was a committee of the Council for War, which included several of the King's principal advisers; and another committee in the same reign was the Committee for Foreign Affairs. After the Restoration, a plan was proposed, apparently with the Royal sanction, for a systematic division of the Privy Council into committees, and some (at least)

(*a*) Cottonian manuscript, cited p. 24 of 'Materials for the History of the Public Departments: London, printed by W. Clowes and Sons, Stamford Street, for her Majesty's Stationery office, 1846' [Private]. This work was compiled by Mr. F. S. Thomas, of the Record office, and contains a valuable collection of materials for the history of the principal public departments.

of these committees were actually established. The plan included a committee for *Foreign Affairs*, which was also to correspond with Justices of the Peace, and other officers in the counties; a committee for *Admiralty, Naval and Military Affairs*, so far as they were fit to be brought before the Council, without intermeddling with what concerned the proper officers; a committee for *petitions of complaint and grievance*, to which "all matters which concern acts of state in the Council" were to be referred; a committee for *Trade*, to which matters concerning foreign plantations, Ireland, Scotland, and the Channel Islands, were to be referred. The principal Secretaries of State were to be of all committees, and "besides the established committees, if anything extraordinary happens which requires advice, whether in matters relating to the Treasury, or of any other mixed nature, other than is afore determined, his Majesty's meaning and intention is, that particular committees be in such cases appointed for them, *as hath been heretofore accustomed;* such committees to make their report in writing, to be offered to his Majesty at the next council day following. If any debate arise, the youngest councillor to begin, and not to speak a second time" (*a*).

At the present time, the most important meetings of the Privy Council, in its administrative capacity, are of two distinct kinds,—meetings in the presence of the Queen in Council; meetings of the Cabinet not held in the presence of the Queen.

With respect to the former, the occasions on which the Queen herself holds Privy Councils are determined partly by usage and partly by statutes. Many of the most important acts of state performed by the Sovereign, and some others of a more formal character, are thus performed by

(*a*) Manuscript in the State Paper Office, said to be without date, but probably written soon after the Revolution, cited Thomas's Hist. of Public Departments, p. 23.

From Roger North's Life of Lord Guilford, p. 125, it appears that the Committee of the Privy Council for Foreign Affairs was in active operation during the reign of Charles II., and was attended by the King.

the Queen in Council. It is to be observed, that these Acts are, in law, the Acts of the Queen *in* Council, and not of the Queen *and* Council; that is, they derive their authority and validity from the Crown only. To the Privy Councils held by the Queen, those members only of the Council are usually summoned who are in the Cabinet.

Among the more important matters of state which are resolved upon by the Queen in Council, are those which are contained in *Orders in Council*, which are subsequently published by *Proclamation*. The nature and authority of proclamations we have already had occasion to consider, and we have seen that in many cases the time and manner in which statutes shall come into operation, is expressly left to be determined by Orders in Council. In these cases the functions of the Privy Council are of a legislative kind, as was pointed out in the commencement of this work. So, likewise, are laws and ordinances made in Council for those colonies and settlements for which the Queen in Council is empowered to legislate. There are other functions of the Queen in Council which are more strictly of an administrative character. Such are the selections of sheriffs for England and Wales, and the issue of proclamations of war and peace.

The writers on the Constitution do not appear to have ever established any general distinction between those Royal prerogatives which are properly exercised in Council and those which are exercised on the advice of individual ministers. The distinction depends partly on usage and partly, in special cases, upon Acts of Parliament. It is, however, probably correct to say that the political acts of the Crown which are of the most general importance are usually performed in Council, and other acts of less extensive operation, upon the advice of individual ministers. Thus, the nomination to offices under the Crown and the issue of pardons belong to the latter class of prerogatives; proclamations for the summons, prorogation, and dissolution of Parliament, to the former class.

Though there is no authentic general rule as to the prerogatives of the Crown which may not be exercised otherwise than in Council, it has been frequently declared in Parliament that important acts of State ought not to be resolved upon without the advice of Council. We have already referred to some instances of this kind, *e.g.* the resolution in Parliament in 9 Edw. II. that no acts of State should be done without the advice of Council; the impeachment of the De Spencers later in the same reign for excluding good counsellors from advising with the King; the impeachment of De la Pole in 28 Hen. VI. for concluding a convention of peace without the assent of the Privy Council; the complaint of the Commons in the commencement of the reign of Charles I., that he was led by the advice of the Duke of Buckingham, and did not duly consult his Council(*a*). Again, one of the charges of the impeachment of Lord Treasurer Danby in 1678 was, that he carried on diplomatic correspondence without communicating with the Council; and one of the charges in the impeachment of Lord Somers in 1701 was, that he affixed the Great Seal to the Partition Treaty without advice of the Privy Council(*b*).

The meetings of the Privy Council in the presence of the Sovereign are recognized by statutes, proceedings of Parliament, and by ancient writers upon the laws of England. For *Cabinet Councils* there is not the same authority. They are merely voluntary meetings of certain members of the Privy Council, at which the Queen is not present; but their proceedings are usually communicated to her by the ministers who have been present at them. The law does not appear to recognize any power in the members of the Council, sitting without the presence of the Sovereign, beyond the power of committal of accused persons, referred to in a preceding chapter, and the statutory powers given to particular members of the Council.

The importance of the Privy Councils held by the Queen

(*a*) *Ante*, p. 239. (*b*) 11 State Trials, 622; 14 State Trials, 253.

in person has been considerably diminished since the transfer of a large part of their consultative functions to Cabinet Councils; and an eminent constitutional writer has contended that the responsibility of the Ministers of the Crown is less definite now than under the ancient practice. But it can hardly be denied, that as political affairs are now conducted with greater publicity than formerly, the ministers are more subject to animadversions of public opinion and Parliament upon their advice to the Crown than formerly. This consideration must not be overlooked in weighing the arguments which are adduced to show that the responsibility of the executive is diminished, and which have been already referred to in a previous chapter(*a*).

Legally, the highest rank in the Council belongs to the President of the Council; but according to modern usage, the chief member of the Council is the First Lord of the Treasury, upon whom the largest part of the responsibility of the administrative government devolves. His power is so far supreme in the Cabinet that he may require that its decisions shall be in accordance with his views; or, in case of irreconcileable differences with his colleagues in the Cabinet, may require their resignation or a dissolution of the Cabinet.

The following Committees of the Privy Council perform administrative functions as distinct departments of Government:—The Committee for Education and the Board of Trade.

The *Committee of the Privy Council on Education* was first established in 1839 to superintend the distribution of sums of money annually voted by Parliament for purposes of public education in Great Britain. The sum placed by Parliament at the disposal of the Education Committee varies from year to year. Previously to 1839, this annual grant was distributed by the Treasury; but in that year,

(*a*) *Ante*, p. 244.

in order to relieve the Treasury from a pressure of business, and to secure a more efficient management of the education fund, the Crown appointed the new Board of Education, consisting of the Lord President and certain other privy councillors. As its connection with various schools is entirely voluntary on the part of their managers, and the Board possesses no compulsory powers, it was not instituted by Act of Parliament, nor has it received any power from Parliament beyond that impliedly conferred by the annual appropriation of a sum for the purposes of education. By the statute 19 & 20 Vict. c. 116, the Queen is empowered to appoint a member of the Privy Council to be Vice-President of the Committee on Education, at a fixed salary.

The Board of Trade is designated more fully "the Committee of Her Majesty's Privy Council appointed for the consideration of matters relating to Trade and Foreign Plantations." This board, unlike that last mentioned, possesses extensive compulsory powers, and therefore demands more particular consideration.

There does not appear to have been any Board of Trade established as a department of the Government before the time of Cromwell, who, in 1655, appointed his son Richard with many Lords of his Council, judges, and several merchants, a committee for trade, who were to consider the means by which traffic and navigation might be best promoted and regulated.

Charles II., in 1660, erected a Council of Trade(*a*) by letters-patent, and shortly afterwards, in the same year,

(*a*) It has been conjectured that the foundation of the Council of Trade is attributable to the Lord Chancellor Clarendon. In his speech to the two Houses of Parliament, on their adjournment in September, 1660, the Lord Chancellor informed them that the King "intended forthwith to establish a Council for Trade, consisting of some principal merchants of the several companies, to which he will add some gentlemen of quality and experience, and, for their greater honour and encouragement, some of the Lords of his own Privy Council." (11 Lords' Journals, 175.)

John Evelyn, in his Memoirs (ed. 1818, vol. i. p. 414), states that the Commission of Trade and Plantations was reconstructed in May, 1671, and

a Council of Foreign Plantations, as colonies were then called. The two councils were distinct, but were in communication with each other. The Council of Trade was to consider the general state of the navigation and trade of the Foreign Plantations, so far as they affected the rest of the King's dominions, and was to take advice, as occasion required, with the Council of Foreign Plantations. The latter council was to collect information of the state of Foreign Plantations, the constitution of their laws and government, to report to the King complaints from the colonies, to use "prudential means" for bringing the colonies into a more uniform way of government, to inquire into the execution of the Navigation Acts, and consider matters relating to emigration and transportation, and the propagation of the Gospel in the Colonies.

In 1672, 24 Car. II., the Boards of Trade and Plantations became united; the former commissions were revoked, and a select council was appointed by a commission to take care of the welfare of the said colonies and plantations, and the trade and navigation of the King's dominions, domestic and foreign, and of his said colonies, etc., already belonging to the Crown, or that might come into the King's hands, wheresoever situate, except Tangier. This commission was, however, revoked in 1675.

William III. revived the Board of Trade and Plantations in 1695, by a commission authorizing the Board to inform themselves of the condition, administration of justice, and the commerce of the colonies, to examine the instructions given to governors of colonies, to take account of their administration, to report to the King in Council names of persons proper to be governors, etc., and to weigh Acts of Assemblies sent to England for the King's approbation(*a*).

included himself. The first business of the Commissioners was to send a circular letter to the governors of various colonies, requiring an account of their state and government. In October, 1672, the Commissioners in this Commission were constituted a Council of Trade also. (*Ibid.*, 433.)

(*a*) Thomas, Hist. of Public Departments, 77.

In 1695, in consequence of complaints of inadequate protection of trade,

In the reign of Queen Anne, the Council of Trade acted as advisers of the Executive Government in colonial and commercial affairs, and the practice appears to have been for the Ministers of the Crown to refer to this Council for their advice on questions relating to emigration to the colonies and projected treaties of commerce with foreign countries(*a*).

The Commissioners for Trade and Plantations continued to be appointed from the time for William III. until 1781. In 1768, the office of Secretary of State of the Colonies was established; but the commissions for Trade and Plantations ran in the same form as previously(*b*).

In 1782, for reasons which will be mentioned in a subsequent chapter, the office of Third Secretary of State, or Secretary of State for the Colonies, was suppressed and abolished by 22 Geo. III. c. 82, as was also the office "commonly called the Board of Trade and Plantations," and (s. 15) "the duty and business done, or which might legally be done, by the late Commissioners of Trade and Plantations, and all authorities, powers, and jurisdictions given to the said commissioners, or by any Act or Acts of Parliament, may and shall be held and exercised under the former directions and trusts, by any Committee or Committees of his Majesty's Privy Council which his Majesty shall be pleased to direct and appoint."

After this time the principal administration of the Colonies ceased to belong to the Board of Trade, and was transferred to other departments, as will be mentioned more particularly in a future chapter. The remaining business of the Board was, after the passing of the Act cited, managed by a Committee of the Privy Council, which was

a motion was made to create, by Act of Parliament, a Council of Trade. This motion was opposed, on the ground that the executive part of the Government belonged to the Crown and not to Parliament, and was not carried. Burnet, Hist. of his own Times, A. D. 1695.

(*a*) Burnet, in his Hist. of his own Times, mentions two references of this kind, one in 1711, and one in 1713.

(*b*) Thomas, 35.

first regularly established by Order in Council in 1786, and has continued as a Board of Trade ever since.

After the transfer of the general superintendence of colonial affairs to the Secretary of State for the colonies, the functions of the Board of Trade became principally confined to mercantile matters. The Secretary of State for the Colonies has, however, usually referred to this Board for its consideration bills of the colonial legislatures relating to trade, and has been guided by the reports of the Board thereon(*a*).

After the Board of Trade ceased to have the administration of the Colonies, many of its executive powers ceased, and its functions became principally consultative. The numerous *ex officio* members of this committee have long discontinued to attend it. At present, where Acts of colonial legislatures (except Acts relating to trade) are referred to this committee by the Privy Council, the report of the committee thereon proceeds from the Colonial Secretary of State, who is one of its members. In all other business the active members of the committee are its President and Vice-President exclusively.

The President is the responsible minister of this department; it is divided into several branches, at the head of each of which is an officer who is responsible to him. These officers are permanently appointed, and do not vacate their offices, as the President does, upon a change of the Cabinet(*b*).

The general business of the department is of a very miscellaneous character. Many matters relating to the interests of trade, which come before the other departments, are referred to the Board of Trade, either for the information of its members or for the purpose of obtaining their advice. Thus, for example, there are frequent communications with the Foreign Office upon the subjects of negotiation of commercial treaties, of difficulties arising out of them, and of the proceedings necessary to give

(*a*) Report to H. of Com. on Admiralty, 1861, No. 5653.
(*b*) *Ibid.*, Nos. 5618, 5725.

effect to them; with the Treasury on the alterations made or contemplated in the laws of the Customs, or cases of hardship in the operation of those laws, and on other points connected with them.

The preparation also of Bills and Orders in Council for carrying out the intentions of Government on these subjects, frequently falls to the care of this Board.

All applications made to the Queen in Council by companies or private persons for charters of incorporation, are referred to the Board of Trade; and besides this practice, the Board has certain statutory powers with respect to particular classes of incorporated companies which will be mentioned presently.

All Acts of colonial legislatures are transmitted to the Secretary of State to be laid before the Queen. These Acts are forwarded by the Secretary of State to the Clerk of the Privy Council, and are thus submitted to the Queen, who thereupon orders a reference to be made to the Board of Trade. As to part of the Acts so referred, the advice of the Colonial Secretary of State is adopted in the manner just mentioned, but all colonial Acts which fall within the peculiar province of the Board of Trade, receive the formal assent of the Board before being assented to by the Crown. The ordinances of the "Crown Colonies" do not necessarily come before the Board, but such of them as relate to trade are usually referred to it (*a*).

By standing orders of Parliament, printed copies of Bills relating to railways, canals, docks, harbours, and other public works, and of "every Bill for incorporating or giving powers to any company," are deposited with the Board of Trade before being brought into Parliament; and plans and sections of various works intended to be authorized by such Bills, are similarly deposited. The Board, or its officers, make reports on Railway Bills, and these reports are referred to the several Committees on those Bills (*b*).

(*a*) Thomas, Hist. of Public Departments, 81.

(*b*) Standing Orders of H. of Commons, Nos. 32, 38, 127, 128.

The *statistical department* of the Board of Trade, collects from public and private sources, information respecting the extent of the commerce, manufactures, and produce of the kingdom; and the accounts of revenue and trade collected by the Board from other departments, are annually presented to Parliament.

Besides its consultative functions, the Board of Trade has several executive powers conferred by modern statutes. Thus, by various Acts relating to merchant shipping(*a*), the Board has administrative powers with respect to the mercantile marine, and the laws of the British merchant service, including the regulation of examinations of masters and mates of foreign-going vessels, the registration of seamen in the merchant service, and the like. The Board has also certain summary powers of adjudicating on claims for wages. The naval department of the Board discharges also various statutory duties, which include the appointment of surveyors, who report on the sufficiency of river steam-vessels before they are entitled to ply for passengers. By a recent statute, certain powers and duties relative to harbours and navigation under local Acts have been transferred from the Admiralty to the Board of Trade, and the sanction of the Board is required with respect to applications to Parliament for such Acts(*b*).

Another department of the Board—the railway department—exercises a supervision over the construction and working of railways, and appoints inspectors, who report on the sufficiency of the works and stock of railways before they are opened, and upon the causes of accidents occurring upon them(*c*).

Another branch of the statutory powers of the Board, is that relating to joint-stock companies. By several Acts of

(*a*) 16 & 17 Vict. c. 129; 17 & 18 Vict. c. 104, part 1.

(*b*) The Harbours Transfer Act, 1862, 25 & 26 Vict. c. 69.

(*c*) The administrative control of railways, originally assigned to the Board of Trade by the statute 3 & 4 Vict. c. 97, was transferred to a separate Board of Commissioners by 9 & 10 Vict. c. 105, but in 1851, was restored to the Board of Trade by 14 & 15 Vict. c. 64.

Parliament, various trading companies are enabled to become bodies corporate upon registration. The affairs of a registered trading company are, upon the requisition of a certain proportion of the shareholders, liable to examination by inspectors appointed by the Board of Trade(*a*). The statutes relating to copyright of designs empower the Board of Trade to regulate the duties of the Registrar of Designs, and to extend the duration of such copyright(*b*). Among others of the multifarious duties of the Board, is the superintendence of the Government Schools of Design, and of several museums and offices maintained at the public expense, for purposes connected with the arts and sciences.

(*a*) The Companies Act, 1862, 25 & 26 Vict. c. 89, s. 56.
(*b*) 5 & 6 Vict. c. 100, s. 14; 13 & 14 Vict. c. 104, ss. 9, 10.

CHAPTER VI.

THE SECRETARIAL DEPARTMENTS.

It has been stated in a former chapter that the King's principal secretary does not appear to have been included among the great officers of State until the time of Henry VIII. A principal or chief secretary existed, indeed, much earlier, but with functions far less important than those which devolved upon the secretary when he became "Secretary of State."

There is mention of the office of King's Secretary as early as the reign of Henry III., when one Maunsell, "*Secretarius noster*," was employed as an envoy to negotiate an alliance with Spain, and other affairs of importance. He was a member of the Council. So late as the middle of the fifteenth century, though the Secretary was often a member of the Privy Council, he was only an inferior officer of the Royal household, and it was not until the reign of Henry VI. that this officer was constantly a member of the Council (*a*).

We have seen that in the early history of the Constitution the Chancellor discharged the duties of a Secretary of State. It is reasonable to conjecture that the great increase of his duties after the Conquest, when he had become the chief judicial officer in the kingdom, rendered it impracticable to employ him as the King's private secretary. He however continued until long afterwards to discharge duties

(*a*) Sir Harris Nicolas, Preface to the sixth volume of the Proceedings and Ordinances of the Privy Council, xcvii *et seq.*

which now devolve upon the Secretary of State. Thus, we find Cardinal Wolsey, Chancellor in the reign of Henry VIII., discharged functions similar to those of the modern Secretaries for Foreign Affairs, such as communicating with envoys from foreign courts, and conducting diplomatic correspondence with English ministers abroad. It is however to be added, that for carrying on this correspondence without the authority of the Privy Council, he was charged with usurping the regular functions of that body (*a*).

The first approach towards rendering the King's Secretary a responsible functionary is considered by Sir Harris Nicolas to have been made by the regulations of the Privy Council in the reign of Henry VI. (apparently 22 Hen. VI., A.D. 1443-4), by which the King's grants upon petition were to be carried out by letters prepared by the Secretary, and sealed by the King's Seal. These letters were an authority to the Keeper of the Privy Seal for passing the grants under the Privy Seal, and to the Lord Chancellor for passing them under the Great Seal (*b*).

The statutes of the reign of Henry VIII. contain references to the King's Secretary. The statute 27 Hen. VIII. c. 11, determines the form of proceeding in his office with respect to royal grants, which were required to be passed under the Signet, Privy Seal, and Great Seal successively. In the statute 31 Hen. VIII. c. 10, which regulates precedence among persons holding various "great offices of the realm," the "King's Chief Secretary" is included, but ranked last. Sir Harris Nicolas considers the commencement of the reign of Henry VIII. to be the period when the King's Secretary became an officer of great consideration, and that previously his duties resembled more closely those of a private secretary than those of the Secretaries of State of the present day (*c*).

The earliest notice yet found of the designation of the Secretary by a title similar to that which he has at pre-

(*a*) See Articles against Wolsey, 1 State Trials, 374.
(*b*) 6 Proceedings of Privy Council, xciv. (*c*) *Ibid.* cxxxiv.

sent, is in 1601, in the reign of Elizabeth, when Robert Cecil was styled *our principal Secretary of State* (*a*).

Lord Camden, in his celebrated judgment in the case of Entick *v.* Carrington (*b*), which involved the question of the legality of commitments by a Secretary of State, thus describes his office:—"This officer is in truth the King's Private Secretary. He is the keeper of the signet and seal used for the King's private letters, and backs the sign manual in transmitting grants to the Privy Seal. The Seal is taken notice of in the 'Articuli super Chartas,' cap. 6 (*c*). And my Lord Coke, in his Commentary, 2 Inst., 556 (*d*) upon that chapter, describes the Secretary as I have mentioned. He says he has four clerks that sit at his board, and that the law in some cases takes notice of the Signet, for a *ne exeat regno* may be by commandment under the Privy Seal or under the Signet. He adds, "It is not difficult to account for the growth of this minister's importance. He became naturally significant from the time that all the courts of Europe began to admit resident ambassadors; for upon the establishment of this new policy the whole foreign correspondence passed through the Secretary's hands, who by this means grew to be an instructed and confidential minister" (*e*).

(*a*) Thomas, Hist. of Public Departments, 27.

(*b*) 19 State Trials, 1046.

(*c*) 28 Edw. I. st. 3, c. 6, "There shall no writ from henceforth that toucheth the common law go forth under any of the petty seals" (in the original *le petit seal*, in the singular number).

(*d*) Also in 4 Coke's Inst 56.

(*e*) The change in the diplomatic practice of European courts from that of sending embassies on particular occasions to that of keeping resident ambassadors at foreign courts, took place subsequently to the peace of Westphalia. (1 Wheaton, 'Elements of International Law,' p. 258.)

The Treaty of Westphalia was concluded in 1648, upon the termination of the Thirty Years' War. But it appears that at an earlier period the English diplomatic correspondence passed through the hands of a Secretary of State. Thus a manuscript in the State Paper Office, dated Dec. 9, 1641, and cited in Forster's 'Arrest of the Five Members by Charles I.,' p. 27 *n.*, states that "all the forraine dispatches, as well as Ireland, are delivered into Mr. Secretary Nicholas."

Until after the Restoration, however, the Secretary of State had far less authority than he afterwards obtained. Lord Clarendon, referring to the Secretaries of State at the beginning of the reign of Charles I., says they "were not in those days officers of that magnitude they have been since; being only to make dispatches upon the conclusion of councils, not to govern or preside in those councils"(*a*).

The principal secretaries must, however, have attained great authority before that time. The King's Secretaries were employed in important State negotiations by Henry VIII., as well as earlier kings(*b*). Sir William Cecil, afterwards Lord Burleigh, and Walsingham, attained great influence in the reign of Elizabeth while they were Secretaries of State, and were employed by her in State business of the highest consequence.

Immediately after the Restoration of 1660 a committee of the Privy Council for Foreign Affairs was (as we have stated) appointed, of which the Secretary of State was a member. But before the Revolution of 1688 the Secretary of State seems to have become the ordinary diplomatic minister of the Crown. The articles of impeachment against Lord Treasurer Danby in 1678 included a charge of treating with foreign ministers, and giving instructions to English ambassadors abroad, without communicating with the *Secretaries of State* and the rest of his Majesty's Council, "*against the express declaration of his Majesty and his Parliament*"(*c*). After the Revolution the negotiations for the Partition Treaty, which were conducted with extreme secrecy, were, by the express command of William III., communicated to no one in England in the first instance, except the Secretary. The Lord Chancellor was, indeed, made cognizant of the mere pendency of negotiations, as he was required to pass under the Great Seal the requisite authority to commissioners to negotiate the

(*a*) Clarendon's 'History of the Rebellion.'
(*b*) Thomas, 'Public Departments,' 24.
(*c*) 11 State Trials, 622.

treaty, but even he was kept ignorant of the nature of the treaty till it was concluded(*a*).

Division of the Secretariat.—Whatever be the number of the Secretaries, they constitute but one office, and are co-ordinate in rank and equal in authority. Each is competent in general to execute any part of the duties of the Secretary of State; the division of duties being mere matter of arrangement. Thus if one of the Secretaries of State, being a member of the House of Commons, be transferred from one secretarial department to another, his seat in the House is not thereby vacated. And in Acts of Parliament giving statutory powers to Secretaries of State, the usual course has been not to designate the particular secretary who is to exercise these powers; but in some modern statutes it is expressed that certain powers thereby conferred shall be exercised by the secretary of a particular department.

The earliest record of a division of the secretariat appears to be in the reign of Henry VI. In 1442 there appear to have been two secretaries for the affairs of France(*b*). From the statute 31 Hen. VIII. c. 10, above cited, which was passed in 1539, it appears that there was then only one secretary. But in the same year, or the following, two principal secretaries were appointed, with like powers and duties. They were to keep two seals, called the King's signets, to seal all warrants and writings, both for inward and outward parts, as had been accustomed, and were to keep a register, and have access to the other's register. They were both to sit in all Councils, and to attend, the one the Upper, and the other the Lower House, by turns in alternate weeks(*c*). In the early part of Elizabeth's reign there was but one Secretary, Sir William Cecil; but two were afterwards appointed. Thus in 1586 Sir Francis Walsingham and Davison held the office to-

(*a*) Answer of Lord Somers to the articles of his impeachment, 14 State Trials, 263.

(*b*) Proceedings of Privy Council, vol. vi. p. cvi. (*c*) *Ibid.* cxxiii.

gether, and in the commission for the trial of Mary Queen of Scots, are alike designated "Principal Secretaries" (*a*).

In 1616–7, there were three principal secretaries, but that was a deviation from the regular practice of appointing two only. Queen Anne, in 1708, in consequence of the increase of business, appointed a third secretary, who and his successors were esteemed Secretaries of State for Scottish Affairs. In 1746, the practice of appointing two secretaries only was reverted to, and this continued until 1768, when, in consequence of the increase of public business of the Colonies and Plantations, a third secretary was appointed to act for the Colonies. This office of third secretary was created upon the junction of the Bedford party with the Grafton Administration. Previously, colonial affairs had been administered by the Board of Trade (*b*).

In 1780, and again in 1781, Burke proposed in the House of Commons his celebrated measures of Reform of the Civil Establishment. These measures, which included the abolition of the Board of Trade and of the office of Third Secretary of State, were defeated by the influence of the Ministry. But at length, under the Rockingham Administration, in 1782, Burke being then in office under that Administration, succeeded in procuring the adoption of some of his economical measures, and the passing of the Act 22 Geo. III. c. 82, by which the office of "Third Secretary of State, or Secretary of State for the Colonies," was suppressed and abolished (*c*).

(*a*) 1 State Trials, 1167. It may be conjectured that Davison was practically subordinate in authority to Walsingham. This seems probable from the circumstance, that in the commission for the trial of Mary Queen of Scots, while the names of Walsingham and all the other great officers of State were included, the names of Davison and of Wolley, the "Secretary for the Latin tongue," were omitted in the first instance; but were afterwards added, on a representation of the judges that it was necessary to the legality of the commission that all the Privy Council should be included in it. Sir H. Nicolas says that about the time when Davison came into office "it was determined to bring the Queen of Scots to trial, and the additional business which must have been expected from that affair was a sufficient reason for creating another Secretary of State." (Nicolas, 'Life of Davison,' pp. 36, 42.)

(*b*) Macknight, 'Life and Times of Edmund Burke,' vol. ii. ch. 28.

(*c*) *Ibid.*

For many years previously to that date, there were two secretarial departments, denominated the *Northern* and *Southern* departments, the former embracing diplomatic correspondence with Northern, and the latter with Southern countries. This division was replaced in 1782, by a division of the secretariat into the *Home Department* and the *Foreign Department*. From that time until 1786, the colonial or third secretary's office having been abolished, as was just stated, the Colonies or Plantations became a branch of the Home Department. The business of the War Department was, from the commencement of the war in 1793, transacted also at the Home Office; but in 1794, the separate Department of War was established, Mr. Dundas being the first secretary. The Colonial Department continued to be a branch of the Home Office until 1801, but was then transferred to the Department of War(*a*).

From that time until 1855, there were always three Secretaries of State,—one for Home Affairs, another for Foreign Affairs, and a third for War and Colonies. In 1854, a fourth Secretary of State was appointed for War, and by an Act of the following year (18 Vict. c. 10), it was provided that three principal secretaries and three under-secretaries might sit at the same time in the House of Commons. In 1858, a fifth Secretariat of State was established for India, and it was then provided by statute 21 & 22 Vict. c. 106, s. 4, that four principal Secretaries of State, and four Under-secretaries, might sit at the same time in the House of Commons.

There are then at present five Secretaries of State, for Home Affairs, Foreign Affairs, the Colonies, War, and India respectively, and of their departments we propose to treat in succession, with the exception of the War Department, the consideration of which is postponed to the chapter on Naval and Military Offices.

Home Department.—The powers of the Secretary of State for the Home Department depend partly on Royal preroga-

(*a*) Thomas, 'Public Departments,' 28.

tive, and partly on statutes. The administrative prerogatives which are exercised by his advice are now exclusively such as relate to the internal affairs of the kingdom. The business of the Home Department, with respect to the internal government, comprises Ireland—by correspondence with the Lord Lieutenant of Ireland, or through the Irish Secretary—and the Channel Islands.

The business of this department does not admit of exact classification, but the following appear to be its principal subjects:—Police, Royal Grants and Appointments, and the Signet.

In the first place, the Secretary of State for the Home Department exercises a general supervision of the *police* of the country, by which is meant that department of government which has for its object the maintenance of the internal peace and prevention of crimes, the protection of public order and public health.

"To the Secretary of State for the Home Department," says Lord Campbell, "belongs peculiarly the maintenance of the peace within the kingdom, with the superintendence of the administration of justice, as far as the Royal prerogative is involved in it. Patents, charters of incorporation, commissions of inquiry, and commissions of the peace, pass through his hands. It is his duty to see that the sentences of all courts of criminal judicature are rigidly carried into effect, except where mitigated by the Royal prerogative of mercy, and it is chiefly by his advice that the exercise of this prerogative is guided. Hence he is in frequent communication with the judges who preside in the Central Criminal Court and at the Assizes, and with magistrates all over the kingdom." The Secretary of State has not, however, Lord Campbell observes, direct authority to remove magistrates. The appointment and removal of magistrates is left to the Lord Chancellor, as responsible adviser of the Crown in the exercise of this prerogative(*a*).

(*a*) Judgment in Harrison *v.* Bush; 5 Ellis and Blackburn's Reports in Queen's Bench, 344.

The constabulary in England, established by modern Acts of Parliament, has almost entirely superseded the ancient system of police. Some of these Acts are local, and establish peace officers in particular towns or districts; others are of more general operation. Thus, the Municipal Corporations Act, 5 & 6 Will. IV. c. 76, s. 76, gives to the municipal corporations power to appoint constables to keep the peace within the boroughs; and the Act 19 & 20 Vict. c. 69, requires the justices of every county to appoint a sufficient police force therein (*a*). The various Acts give to the Secretary of State considerable powers of superintending the management of the constabulary, including the making or sanctioning of general rules for their management and pay; and the justices are required to report to him various particulars with respect to the constabulary of their districts (*b*).

Under the Prisons Regulation Act, 5 & 6 Will. IV. c. 38, inspectors are appointed by the Secretary of State, who report to him on the condition of prisons and hulks; and all rules for the government of prisons in England and Wales are to be made subject to his approval.

The Home Secretary has also power of making the regulations under which witnesses and others are allowed their expenses of criminal prosecutions (*c*).

The Royal prerogative of pardon is usually exercised on the advice of the Home Secretary, founded on the recommendations of the judges, or inquiries into the nature of the evidence upon which convictions have taken place (*d*).

The Secretary of State has also various powers in relation to institutions established by Acts of Parliament for the preservation of public health, the regulation of various

(*a*) By 3 & 4 Vict. c. 88, ss. 27, 28, regulations of the county justices as to the formation of county police, districts, and expenses of constables, are subject to the approval of a Secretary of State.

(*b*) Some of the returns formerly required to be made to a Secretary of State with respect to prisons and police, are abolished by 21 & 22 Vict. c. 67.

(*c*) 14 & 15 Vict. c. 55, s. 5.

(*d*) See *ante*, Book II. Ch. X.

trades and manufactures, and other purposes of public economy, too miscellaneous to admit of classification. Some of them may, however, be briefly referred to as illustrative of the extent and variety of the duties of the Home Department. They include the approval of regulations for lunatic asylums in counties and boroughs(*a*); the regulation of the duties of Inspectors of Factories under the Acts restricting the hours of labour by young persons in various factories, and making provisions against accidents from machinery(*b*); and the appointment of Inspectors of Mines for similar purposes(*c*).

The foregoing functions of the Home Department relate to Police, in the general sense in which that word has been here used. Another distinct class of the business of the Home Secretary relates to Royal *grants and appointments*, and the *Signet*.

An ancient duty of the Secretary is the custody of the King's signet, used in sealing all grants superscribed by the Royal sign-manual.

From a very early period the King has attested every solemn Act of State by affixing to the instrument either his greater or his smaller Seal, according to its importance. The responsibility of affixing the Great Seal to such instruments has always been thrown upon the King's Chancellor, who is consequently the highest civil officer in the kingdom, or upon the Keeper of the Great Seal. In order to restrain the exercise of the prerogatives of the Crown, except by the advice of responsible ministers, the legislature has from time to time made various regulations to prevent the minor Royal Seals, the Privy Seal, and the King's Signets from usurping the functions of the Great Seal(*d*), and has prescribed various formalities as to the use of the Great Seal.

(*a*) 16 & 17 Vict. c. 97, s. 53. (*b*) 7 Vict. c. 15. s. 6.

(*c*) 5 & 6 Vict. c. 99, s. 3.

(*d*) *E. g.* the statutory provision of 28 Edw. I., cited in a previous note to this chapter, that no writ touching the common law should issue under the petty seal.

Excepting a few cases, the Great Seal cannot be used without the express command of the King, notified to the Chancellor, either orally, or by letters under the Signet or other small seal, addressed directly to him, or by letters under the Privy Seal similarly addressed, or by the two latter means conjoined, *i. e.* by letters under the Signet addressed to the Keeper of the Privy Seal, who thereupon intimates the Royal pleasure to the Lord Chancellor by a warrant under the Privy Seal.

It is remarkable that the present system of a gradation of officers, each imposing a check upon the other in authorizing grants under the Great Seal, though it existed to some extent in earlier reigns, was not generally established until the reign of Henry VIII. By a statute of that reign (27 Hen. VIII. c. 11) it was provided that Royal grants, with certain exceptions, should be delivered in the first place to the King's principal secretary or a clerk of the Signet; that thereupon a warrant should issue under the *King's Signet* to the Keeper of the Privy Seal, and next, that a warrant should issue under the *Privy Seal* to the Lord Chancellor or Keeper of the Great Seal, for sealing therewith letters-patent, or other instruments, according to the warrant under the Privy Seal.

This course, with respect to the issue of grants under the Great Seal, is substantially observed at the present time. There are some important instruments, however, which pass under the Great Seal, pursuant to warrants signed by the King, without warrants of Privy Seal, and without being entered at the office of the Privy Seal or of the Signet. Among the instruments in question are patents of appointment of various common-law judges and officers, and commissions for opening and proroguing Parliament, and for giving the Royal assent to Bills in Parliament.

There are some commissions under the Great Seal for which the direct authority of the Crown is not necessary, and which are issued in the fiat of the Lord Chancellor only. These include commissions for holding circuits in England

and Wales, and other commissions for the administration of justice. Writs of summons to Peers to attend Parliament on succeeding to the peerage, are issued upon the written order of the Lord Chancellor to the clerk of the Crown. The Lords of the Admiralty and certain great officers of State issue warrants, not signed by the King, for the preparation of grants of offices in their patronage, which pass under the Great Seal.

By a comparatively modern usage, which commenced probably soon after the Revolution of 1689, Bills of Crown Grants are, with some exceptions, settled by the law officers of the Crown (the Attorney-General and Solicitor-General), and then brought to the Secretary of State's office for the Royal signature to be obtained to them, after which they pass through the Signet office and the Privy Seal office in the usual manner(*a*).

The Royal sign-manual, or signature of the Sovereign, is usually written on the upper left-hand corner of the instrument, and is sometimes countersigned by a Secretary of State, and sometimes by Lords of the Treasury, according to the nature of the instrument. By a recent statute, the authority for passing grants under the Great Seal is now, with some exceptions(*b*), by warrant under the sign-manual, countersigned by a Secretary of State, and sealed with the *signet*. The warrant is then forwarded to the office of the Lord Privy Seal, where it receives the Privy

(*a*) The foregoing particulars respecting the Great Seal are principally abstracted from the preface to the sixth volume of the Proceedings of the Privy Council, edited by Sir Harris Nicolas.

(*b*) The warrant granting letters-patent for inventions formerly passed through the Signet Office; but now the practice is altered by 15 & 16 Vict. c. 83, and the warrant is sealed by the "Commissioners of Patents of Inventions."

The statute 27 Henry VIII. c. 11, which regulated the manner of passing grants from the Crown, recognized the authority of the Lord Treasurer to issue warrants for letters-patent for those grants which it belongs to his office to make. This practice is not abolished by the Act 14 & 15 Vict. c. 82. As to the practice which formerly prevailed of issuing public money under the authority of writs under the Privy Seal, see the next chapter.

Seal, and being so signed and sealed, authorizes the Lord Chancellor to pass letters-patent under the Great Seal, according to the tenor of the warrant(*a*).

The Signet Office, though always a branch of the Secretariat, was formerly separated from it for convenience, but now the duties of the signet are exercised in the office of the Secretary of State for the Home Department, and under his directions(*b*).

Among the appointments and grants which pass through the Signet Office, are appointments of Archbishops and Bishops, presentations to certain deaneries and livings in the gift of the Crown.

The various Commissions of Inquiry which, as has been mentioned, are occasionally appointed by the Crown for the examination of the state of public institutions, and other matters of social importance, are prepared at the Home Office, which conducts the correspondence of the Executive Government with such commissioners.

An important branch of the duties of the Home Office consists in furnishing information on various subjects to Parliament. A considerable part of the returns obtained by means of motions in Parliament, and relating to the internal affairs of the country, are procured by the Home Office. Printed copies of private Bills relating to turnpike roads are required to be deposited at the Home Office, and the Home Office makes reports thereupon, which are referred to the committees of Parliament on such Bills(*c*).

Foreign Office.—The Royal Prerogative in international affairs, like other branches of the Royal Prerogative, is exercised either by the Queen in Council, or upon the advice of individual ministers. The nature of the prerogatives relating to the declaration and conclusion of war, embargoes, and alliances(*d*), has been described in a pre-

(*a*) 14 & 15 Vict. c. 82, s. 2. (*b*) *Ibid.* s. 3.
(*c*) Commons' Standing Orders, 38, 178.
(*d*) *Ante*, Book III. Ch. II.

ceding chapter; and we have also seen that formerly foreign affairs were under the administration of the Council(*a*), an that many of the international prerogatives are still exer cised by the Queen in Council(*b*). In the exercise of othe international prerogatives, the Secretary of State for Foreig Affairs is the general immediate agent of the Crown.

The Foreign Secretary is principally responsible for th negotiation and conclusion of Foreign Treaties. He in vestigates, and requires the necessary redress of grievance of British subjects residing abroad; and is charged with th duty of seeing that treaties and international laws affect ing the country are observed by Foreign Powers. H corresponds with and receives dispatches from British Mi nisters and Consuls resident abroad, and communicate with the representatives of Foreign Powers resident in thi country. He recommends to the Crown ambassador ministers, and consuls, to represent Great Britain abroad and countersigns the warrants for their appointments.

The Foreign Secretary grants passports to British sub jects and naturalized aliens.

All matters of diplomatic expenditure, and claims o ministers abroad, are under the cognizance of the Foreig Office, which also has cognizance of all questions relatin to the immunities of foreign ministers in England, and o English ministers in foreign countries(*c*).

The largest part of the transactions of the Foreign Offic consists in diplomatic correspondence, and the receipt, trans action, analysis, and record of dispatches from abroad. Th nature of the responsibility of the Foreign Secretary ma be partly understood from the following passage in a lette from the Queen, read by Lord John Russell in the Hous of Commons, Feb. 3, 1852. The Queen required, firs that the Secretary for Foreign Affairs should "distinctl state what he proposes in a given case, that the Queen ma

(*a*) *Ante*, Book III. Ch. V. (*b*) *Ante*, p. 28.

(*c*) Report to the House of Commons on Miscellaneous Expenditu 1848; Report on Official Salaries, 1850.

as distinctly know to what she is giving her Royal sanction. Secondly, that having once given her sanction to a measure, it be not altered or modified by the minister. Such an act she must consider as failing in sincerity towards the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that minister. She expects to be kept informed of what passes between him and foreign ministers before important decisions are taken, based upon that intercourse, and to receive foreign dispatches in good time, and to have the draughts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off."

The Colonial Department was not constituted a distinct branch of the Secretariat until after the commencement of the reign of George III. and, during the present century, until within the last few years, was combined with the War Department.

Upon the establishment of the Secretariat for the Colonies in 1801, all the fees which had previously existed in the office of the Lords Commissioners of Trade and Plantations, were transferred to the Colonial Office, and also all the fees connected with the East Indian and Colonial appointments which used to be received at the Home Office(*a*).

The Secretary of State for the Colonies is now the organ of communication between the Government of this country and the Colonial governments. The larger colonies have generally legislative assemblies, partly or wholly elective; and in the colonies which have not legislative assemblies, there are generally executive councils possessing authority to pass ordinances which have the effect of colonial laws. In all the colonies are governors and other officers appointed by the Crown; and the Colonial Secretary has the general duty of advising the Crown with respect to these appointments. The judges in the Colonies

(*a*) Thomas, Hist. of Public Departments, 35.

are appointed by a Royal warrant which issues from the Colonial Office (*a*).

The Colonial Secretary issues instructions to these executive officers upon all matters of colonial government which are left to the decision of the administrative government in this country. All Acts of Colonial Legislatures may be disallowed within a limited time by the Crown. "The authority of the Home Government over the Colonies," says Earl Grey (*b*), "is exercised mainly in two ways—first by the appointment of governors, and secondly by sanctioning or disallowing measures of the local government of which these officers are at the head. It is also exercised sometimes, but much more rarely, in prescribing measures for their adoption." All colonial enactments and ordinances are therefore examined in the Colonial Office, and the results of such examinations are reported to the Colonial Secretary. To him also is usually assigned the principal responsibility of devising and submitting to the Imperial Parliament laws peculiarly affecting the Colonies—such as enactments constituting colonial legislatures, or regulating the sale of Crown lands in the Colonies, and enactments respecting the protection of emigrants.

The Colonial Office is divided into several branches, each of which takes cognizance of the affairs of a group of colonies. The dispatches from the several colonies are examined in these departments, and ultimately by the Secretary of State, who is solely responsible for the replies sent to them (*c*).

The Colonial Land and Emigration Board, which is a department subordinate to the Colonial Office, enforces the provisions of various Acts which have been passed for the protection of emigrants, principally with reference to their conveyance to the Colonies in ships properly constructed and provisioned.

(*a*) 6 Proceedings of Privy Council, ed. by Sir Harris Nicolas, ccvi. note.
(*b*) On Colonial Policy, 8vo, 1853.
(*c*) Report to H. of Com. on Admiralty, 1861, No. 1314.

The office of the *Secretary of State for War* is so intimately connected with other departments of military administration that it will be convenient to postpone the account of the War Department to the chapter of this book relating to naval and military offices.

The office of the *Secretary of State for India* was originated by the statute of 1858, 21 & 22 Vict. c. 106, which transferred the government of India from the East India Company to the Crown. The Act provides that a Secretary of State shall perform all such duties with respect to the government of India as were formerly performed by the Company, and abolishes the powers of the commissioners for the affairs of India—usually called the Board of Control—who formerly exercised on behalf of the Crown a power of control of the political powers exercised by the Company. A Council of India is established by this Act, consisting in the first instance partly of members appointed by the Crown, and partly of members appointed by the Company; and future vacancies in the Council are to be filled up partly by the Crown and partly by election of the Council (s. 9). The members hold their offices during good behaviour, but are liable to removal upon address of both Houses of Parliament (s. 11). The Council, under the direction of the Secretary of State, conducts the business transacted in the United Kingdom in relation to the government of India and the correspondence with India. But every order and communication to the Government in India must be signed by the Secretary of State; and all acts of the Council, with some exceptions, require his sanction (ss. 19, 23). Where, however, the Secretary of State determines in opposition to the recorded opinion of the majority of the Council, he must record his reasons in writing (s. 25). The expenditure of the revenues of India is subject to the control of the Secretary of State in Council, who is required to lay before Parliament annual accounts of the revenue, and of all receipts and disburse-

ments at home and abroad on account of the Government of India (s. 53).

The Secretary of State for India is usually a member of the Cabinet, and resigns his office with the other members of the Cabinet; whereas the Council over which this Secretary of State presides is permanent. The Council appears to have been instituted for the purpose of checking any arbitrary exercise by the Secretary of State for India of his powers. In general, the Secretary may overrule the majority of the Council, but he cannot do so in questions of imposing charges on the revenue of India, and certain questions of patronage. The statute of 1858 requires (s. 29) that appointments of the Governor-General of India and of Governors of Presidencies, and of members of their Councils, shall be made by the Secretary of State, with the concurrence of a majority of his Council. The Act requires also (s. 41), that no part of the revenues of India shall be granted or appropriated by the Secretary of State, without the like concurrence.

CHAPTER VII.

THE FISCAL ADMINISTRATIVE OFFICES.

THE receipt and expenditure of the public revenue constitute those branches of the administrative government over which Parliament has exercised the most constant and vigilant control. This supervision began almost as soon as the two Houses of Parliament were established; and among the earliest statutes after the constitution of the Legislature in its present form, are statutes regulating the receipt of the Exchequer. The earliest of these statutes relate principally to the revenues collected by sheriffs, who were the chief collectors of the ordinary revenue when it consisted of the profits of Crown lands and prerogative revenues(*a*). It was not however until the hereditary and prerogative revenues had dwindled into comparative insignificance, that the control of Parliament over the application of public money became very active and efficient. So long as the Crown was supported chiefly by its own ancient revenues, Parliamentary control of them was principally directed to the security of debtors to the Crown from extortion. When

(*a*) By 51 Hen. III. stat. 5, A.D. 1266, sheriffs and other officers receiving the King's revenüe are to account to the Treasurer and Barons of the Exchequer. The statute called "les estatuz del Eschekere" (see authorized edition of 'Statutes of the Realm,' vol. i. p. 197), which regulates the revenue of the King's demesnes, is probably of the time of Edward I. The "statutum de vice-comitibus," 14 Edw. II., provided a mode of procedure against sheriffs for default of payment of public money received by them into the Exchequer. Other ancient statutes regulating the Exchequer are 31 Edw. III. c. 3, and 37 Edw. III. c. 4.

however extraordinary grants were demanded by the Crown from Parliament, the latter frequently directed and controlled the appropriation of such grants. Of such appropriation we have cited some very early instances in the chapter relating to Parliamentary supply; but it was not until after the Revolution of 1688 that the system of appropriation became regularly and effectually established. In order to comprehend the modern system of Parliamentary control over the receipt and expenditure of public money, it is necessary to keep in mind the nature of the Royal fiscal prerogatives, and the method of Parliamentary supply, which have been considered in previous chapters.

In endeavouring to make clear the somewhat complicated subjects of the present chapter, we propose in the first place to consider briefly the ancient constitution of the fiscal offices, so far as relates to those principal distinctions of their duties which have been retained in modern times. The constitution of these offices has been so materially altered that their ancient history is of little interest to the student of our modern Constitution, except the part of that history which illustrates the modern distinctions between the Treasury and Exchequer.

At a very early period the Exchequer became divided into several branches. Almost entirely distinct from, or independent of the rest, was the judicial branch, which has been already described in the second book of this treatise, and to which it will not be necessary to advert further(*a*). Besides this division there was another made at an early period between the part of the Exchequer called the *Thesaurus*, which issued the King's treasure, and the receipt of Exchequer—*inferius scaccarium, Scaccarium de Receptâ*, or *Recepta Scaccarii*, which received the King's treasure(*b*).

(*a*) The functions of the Barons of the Exchequer were always principally judicial, and the administrative functions which they anciently possessed were limited to the taking and stating the accounts of the revenue; but they had no jurisdiction to order payments out of the Exchequer. Lord Somer's judgment in the Banker's case, 14 State Trials, 54.

(*b*) Madox, Hist. of Exchequer, ch. 8.

How far this distinction was analogous to that which exists in modern times between the Treasury and Exchequer, seems doubtful. But it appears to be beyond doubt that at a very early date a division between the powers of the *Treasurer* and those of the officers of the Exchequer, existed, which closely corresponded to the modern division of fiscal powers. In order to explain this analogy, it will be expedient to anticipate in some degree the account which will hereafter be given of the modern Exchequer and Treasury. The modern Exchequer, then, has the office of keeping public money in the custody appointed by the Legislature, and of seeing that none of it is issued illegally. The Treasury has the duty of issuing directions to the Exchequer for payments and disbursements of public money; and the Exchequer, which exercises an independent control of the issues, authorizes such payments, if satisfied that they are lawful.

Now this distinction seems to have been very early. Lord Somers, in his judgment in the "Banker's case," 12 Will. III., A.D. 1700, in which he most minutely and learnedly investigated the ancient course of the Exchequer, states that from the time of King John payments were always made at the receipt of the Exchequer only upon warrant under the Great or Privy Seal, and that the same course continued to be observed in substance to the time when the judgment of Lord Somers was delivered. From the time of Queen Elizabeth payments were usually authorized by general writs under the Privy Seal; but no payments were made under those general Privy Seals, except by virtue of the King's particular warrants, countersigned by the Lord Treasurer, or those commissioners of the Treasury who in later times exercised his office(*a*).

The ancient course of issues out of the Exchequer was, then, as follows. The Sovereign's writ, under the Privy Seal, addressed to the Treasury, authorized the issue of the required sum; which writ was entered at the Receipt of

(*a*) 14 State Trials, 53, 55.

the Exchequer, and was *put into operation* by warrants of the Treasury. The Treasury warrant authorized the drawing an order upon the Tellers of the Exchequer, who had the custody of the public money. The order was signed by the officers of the Treasury, and upon presentation at the Exchequer the Tellers issued the sum specified in the order(*a*). The Act 8 & 9 Will. III. c. 28, "for the better observation of the course anciently used in the Receipt of the Exchequer," prohibits the Tellers from parting with any of the money in their custody without such order, and without "taking a receipt to discharge the King, according to the ancient course and practice of the said Receipt."

Thus the original authority for every issue of the public money was a Royal writ, under the Great Seal or Privy Seal, or in later times under the Privy Seal exclusively. Such writ was issued by the Crown in exercise of the prerogative right of controlling the issue of the Royal revenue; and this prerogative is preserved, as we shall see hereafter, to the present day(*b*).

But the general writ from the Crown was not put into operation without a further written authority from its chief fiscal minister, the Treasurer. This latter practice, however, does not appear to have existed before the time of Elizabeth(*c*).

(*a*) Thomas, 'Public Departments,' 5.

(*b*) This Royal authority for issues of public money has been from ancient times regarded as essential. In the ancient Dialogue de Scaccario (lib. i. c. 6), it is said expressly, "Thesaurarius et camerarii, nisi regis expresso mandato, vel præsidentis justiciarii, susceptam pecuniam non expendunt; oportet enim ut habeant auctoritatem rescripti regis de distributâ pecuniâ." (Madox, Hist. of the Exchequer, vol. ii. p. 373.) The presidens justiciarius here referred to was the *custos regni*, or lieutenant of the King in his absence. (Banker's case, 14 State Trials, 67.)

For writs under the Privy Seal, orders under the Royal sign manual, countersigned by the Commissioners of the Treasury, are now substituted.

During the mental incapacity of George III., the deputy clerks of the Privy Seal considered themselves bound not to prepare warrants to pass the Privy Seal for want of warrant signed by the King; and the Auditor of Exchequer refused to issue money under Treasury warrants merely. But both Houses of Parliament agreed to resolutions authorizing the Exchequer to obey the Treasury warrants. (May's 'Constitutional History,' p. 180.)

(*c*) One of the articles of impeachment of the Duke of Buckingham, in

In earlier times, the Treasurer acted personally at the Exchequer, and there was therefore no necessity for his giving written directions to execute the writs of the Sovereign. As, however, the Treasurer's other duties increased, he became less able to attend and personally direct the execution of the Royal precepts, and hence arose the necessity of written directions to his officers. It is probable that Lord Burleigh was the first Treasurer who used a secretary to notify his directions and orders to the officers of the Receipt side of the Exchequer in writing. There are, however, evidences that the Lord Treasurer and Under-Treasurer personally transacted business at the Exchequer, and signed papers there, up to the time of the removal of the Exchequer to Oxford, by Charles I., in 1643. After the Restoration, the Treasury Board sat at a place called the *Cockpit*, and from that time (A.D. 1660) forward it does not appear that the Treasurer executed his office personally in the Exchequer(*a*).

The separation of the two offices which thus took place must be regarded as a matter of considerable importance in its constitutional effects. The independence of the Exchequer, which is now scrupulously guarded by the legislature, was hardly possible so long as the Exchequer was united with the Treasury and directly under its control. It must not be inferred, however, that the mere separation of the two departments sufficed to secure the proper independence of the Exchequer. We have manifest proof to the contrary, in an event which occurred some time after the separation took place. After the Restoration, Charles II. borrowed large sums of money of various bankers, on the security of the public revenues, and they received orders upon the Exchequer for payment of their principal and in-

2 Car. I., A.D. 1626, charged him with procuring great sums of money to be issued in the previous reign under Privy Seals, to his own use. The Duke held several offices under the Crown, but not that of Lord Treasurer, and it was insisted by the Commons that his procuring these Privy Seals was an encroachment upon the office of the Lord Treasurer. (2 State Trials, 1364.)

(*a*) Thomas, Hist. of Public Departments, 4.

terest out of the moneys coming into the Exchequer. In 1672, Charles, pressed by his necessities, resolved, upon the advice of his political ministers, to adopt the violent expedient of shutting up the Exchequer and stopping payment of these orders. The project was proposed in Council, January 2, 1672; and four days afterwards, in obedience to the directions of the Treasurer, the officers of the Treasury discontinued payments(*a*).

In later times, the independence of the Exchequer has been secured by giving to its chief officer a permanent tenure of his office during good behaviour. In times long anterior to the events last referred to, other checks upon the power of the Treasurer were adopted. Thus, in Norman times, a control was exercised over him by the Chief Justiciar(*b*). This appears from the impeachment (already mentioned) (*c*) of Hubert de Burgh, who was Chief Justiciar, and was called to account, in the reign of Henry III., for the management of the public revenue during the first fourteen years of that reign, though there was a Treasurer during the same period. Very shortly after that period, viz. in 18 Hen. III., an officer was appointed, who, Madox appears to think(*d*), was the first Chancellor of the Exchequer, and was appointed to be a check upon the Treasurer. The officer so appointed was to reside at the Receipt of the Exchequer, and to have a counter-roll of all things pertaining to the said receipt. The functions of the Chancellor of the Exchequer—assuming them to have been originally to exercise a check upon the Treasurer—have long lost their original character. In 1622, there was a commission enabling the Lord Treasurer to act as Chancellor of

(*a*) Burnet, Hist. of his Own Times, A.D. 1762.

An Order in Council, Jan. 2, 1671, O.S., directed a stop to be made of payment of Exchequer moneys for the space of a year; by another declaration, Dec. 11, 1672, the stoppage was to be continued till the May following. (Lives and Writings of James I., Charles I., etc., by William Harris, ed. 1814, vol. v. p. 274.)

(*b*) Spelman's Gloss. 331, *sub voce* "Justitia."

(*c*) *Ante*, Book III. Ch. 4.

(*d*) Hist. of the Exchequer, vol. ii. p. 113.

the Exchequer(*a*), and the latter is now, and long has been, an officer of the Treasury, and (notwithstanding his title) not of the modern Receipt of Exchequer.

These appear to be the principal particulars concerning the ancient Exchequer, which illustrate the principles upon which the fiscal offices of Government are now constituted. We proceed to consider the modern constitution of these offices, premising that a perspicuous description of them is rendered difficult, partly by their complicated nature, and partly by the numerous changes to which they have, in modern times, been subjected by the Legislature.

For the sake of clearness, it will be expedient, before describing particularly the constitution of particular offices, to give a general account of the modern system of managing the receipt and disbursement of the public revenue. The explanation of this system will show the connection between the fiscal offices and the powers which they have with respect to each other. The general account is naturally divided into three parts:—1. The Receipt of Public Money. 2. The Issue of Public Money. 3. Audit.

1. *The Receipt of Public Money.*—This part of our subject is comparatively simple. The Receipt of Exchequer has been, as its name implies, from very early times, the principal central office for the receipt of the public revenue. Anciently, as has been already observed, the principal sources of the Royal revenue were the hereditary lands of the Crown, and certain prerogative casual sources of profit. The revenues from both sources were collected by various officers of the Crown, of whom the principal were the sheriffs and the escheators in counties, and bailiffs in boroughs(*b*). The revenues collected by the sheriffs were of two kinds, the first arising from the demesne lands of the Crown, the second consisting of certain rents called *viscontiel* rents, or rents for which the sheriffs were accountable

(*a*) Thomas, Hist. of Public Departments, 10.

(*b*) See *infra*, the Chapter on Local Administrative Government.

with other branches of revenue. Besides the sheriffs, there were other accountants to the Crown, or collectors of revenue, such as escheators, or collectors of the *casual* revenues of the Crown(*a*), and *custodes*, or bailiffs, of those towns and burghs which were not within the body of any county. The accountants paid the money with which they were accountable into the Exchequer, deducting, however, various allowances for payments made by them under sufficient warrant(*b*).

Partly by alienation of Crown lands, and partly by other causes which have been sufficiently explained in the former chapter relating to the fiscal prerogatives of the Crown, all these sources of revenue are now become of small amount, compared with the taxes and customs imposed by Parliament. The system is retained of paying in the collected revenue to the account of the Exchequer, but the mode of collection is entirely altered. The sheriffs have ceased to be the principal collectors of the revenue, and by 3 & 4 Will. IV. c. 99, s. 12, are relieved from the collection of viscontiel rents and rents of the Crown lands, of which the collection is thereby assigned to the Commissioners of Woods, Forests, and Land Revenues. For the collection of the Parliamentary revenues, various tax-gatherers and collectors of customs are appointed by the statutes granting those revenues, but of these officers it will not be necessary to give a particular description.

The receipt of revenue to the account of the Exchequer is now regulated by the statute 4 & 5 Will. IV. c. 15, "An Act to Regulate the Office of the Receipt of His Majesty's Exchequer at Westminster," and some subsequent statutes.

(*a*) "*Eschaetor*, an ancient officer so called, because his office is properly to look to escheats, wardships, and other casualties belonging to the Crowne. In ancient time there were but two escheators in England, the one on this side *Trent*, and the other beyond *Trent*. At which time they had subescheators. But in the raigne of *Edward* the Second, the offices were divided, and several escheators made in every county for life," etc. (Co. Litt. 13 b.)

(*b*) Thomas, 'History of Public Departments,' 91.

Of the first of these Acts we shall here mention those provisions only which relate to the constitution of the Exchequer, and the *receipt* of revenue, reserving the particulars of the issue of public money to the second branch of our inquiry.

The Act in question was made to carry into effect certain improvements in the Exchequer proposed by Commissions of Inquiry appointed in 1830 and 1831, and remodels the constitution of the Exchequer, by abolishing the former offices, and directing that the establishment shall henceforth consist of a *Comptroller-General* of the receipt and issue of the Exchequer, an Assistant Comptroller, and certain subordinate officers. The Comptroller is to be appointed by letters-patent under the Great Seal, and to hold his office *during good behaviour*, subject, however, to removal by the Crown on the addresses of both Houses of Parliament. He is incapable of holding any office to be held during pleasure under the Crown, and is required to execute his office in person.

The old system of retaining public money at the Exchequer itself, is entirely abolished. All moneys, etc., of the Crown in the Exchequer at the time of the passing of the Act, were required to be transferred to the Bank of England, to "the account of his Majesty's Exchequer," and all money theretofore payable into the Exchequer was required to be thenceforth paid into the Bank of England, to the credit of the Exchequer; and an account of such payments was required to be transmitted daily by the Bank to the Exchequer, and also to the Treasury. The money so paid into the Bank constitutes one general fund, out of which the credits to the various officers to whom money is to be issued for the public service are to be satisfied.

The revenues which are thus paid into the Bank of England to the account of the Exchequer, now comprise all the principal revenues of the kingdom, and include(*a*) the Customs and Inland Revenue, and Post-Office Revenue. There

(*a*) Report to the House of Commons on Public Moneys, 1857.

are, however, some minor parts of the revenue which are not so paid in.

The procedure of the Parliamentary taxes constituted formerly separate and distinct funds; but at last it became necessary, in order to avoid confusion, to blend these funds together; and by statutes of the reign of George III. these have been consolidated in one fund for the whole kingdom, and constitute the Consolidated Fund, which has been referred to in previous chapters(*a*).

A considerable improvement in the system of payment of revenue into the Consolidated Fund has been effected by a recent statute, 17 & 18 Vict. c. 94. Formerly, the charges of collection and management of the revenue of Customs, Inland Revenue, and the Post-Office, were payable out of those revenues respectively; and only the *net* revenue, after various deductions, was paid into the Consolidated Fund. The Act in question recites that it is expedient that the *gross* income and expenditure of the United Kingdom should be brought under the immediate control of Parliament, and provides that the allowances and payments referred to shall cease to be payable out of the particular branches of revenue; and that these charges of collection and management, and various other expenses mentioned in the Act, shall be paid out of supplies from time to time appropriated by Parliament for the purpose.

2. *The Issue of Public Money.*—The business of the Exchequer is not confined to the receipt of public money, but extends also to its issue under the proper authority. The issue as well as the receipt is regulated by the statute above cited, by which the Comptroller-General is appointed; and no money paid into the Exchequer can be paid out without his authority. "The Exchequer who issue the money brought in from the several duties and taxes to the services, voted by the House of Commons, are obliged in their issue for any particular service to attend to the credit which that service has with the Exchequer at the time of issuing

(*a*) *Ante*, p. 189.

the money, and to be careful that they are justified by the vote of the House of Commons for the payment upon that head of service" (*a*).

In a previous part of the work relating to the grants of supply, we have explained that the expenses of Government are provided for partly by aids and supplies specially appropriated by Parliament to the several services from time to time (usually annually), and partly are *permanently* charged on the revenue by various statutes. The sums payable under the former class of grants are payable only once; the payments of the second class are periodical, and are repeated as long as the Acts authorizing prescribe. The manner in which disbursements are authorized by the Exchequer to meet these expenses, is different for the two classes.

With respect to the first class,—that is, *special* grants for specified expenses of the public service,—the first authority for the disbursement is a *Royal order* under the sign-manual, countersigned by the Commissioners of the Treasury. This Royal order refers to the particular Act or vote of Parliament which grants the money to which the order relates, and authorizes the Comptroller-General to place the amount voted to the credit of the proper officer in that branch of the service for which it has been voted, at such times and in such proportions as the Treasury may direct. This Royal order is delivered to the Exchequer, and it is the duty of the Comptroller there to satisfy himself that it is in conformity with the grant of Parliament. The Royal order is put into operation by Treasury warrants requiring the Comptroller-General to transfer to the credit of the proper officer specified portions of the sum comprised in the Royal order. It is the duty of the Comptroller to compare these Treasury warrants with the Royal order, and to satisfy himself that they do not exceed the order. In that case, he issues an Exchequer warrant authorizing the Bank of England to grant credits accordingly for the specified sums. (4 Will. IV. c. 15, ss. 11, 12.)

(*a*) 3 Hatsell's Precedents, 209 *n*.

With respect to the second class of grants,—those permanently charged upon the revenue,—the Royal order is dispensed with, but the course of issue is in other respects substantially the same as in the first case (s. 13).

The method of issuing moneys annually granted by Parliament may be otherwise described as follows:—The Crown, by Royal order, delegates to the Treasury the power of applying the supplies; the Treasury warrant practically delegates to the Secretary or Assistant Secretary of the Treasury the duty of authorizing issues; the Secretary or Assistant Secretary requires the Comptroller-General from day to day to authorize the Bank to give the credits required by the paying officers of the Government(*a*).

The business of sanctioning public payments thus in a great measure devolves upon the Treasury. The Comptroller-General has no power of investigating the validity of claims for such payments, nor of seeing that the sums issued are actually appropriated to the services for which they are issued. His only power is to prevent issues from exceeding the grants, and to see that the issues are made to the proper officers. Where however the same officer receives the issues for several services, these issues may, without any check from the Comptroller-General, be applied to the several services interchangeably. This in effect happens. Before the Exchequer Act passed there were separate pay-offices for the army, navy, ordnance, and civil services; but all these are now absorbed in the office of one Paymaster-General. The amalgamation has facilitated transfer of issues from one service to another; and it appears to have been recently a frequent practice in the Paymaster's department to cause moneys issued by the Comptroller for particular services to be applied to other services, and to rectify the interchange of issues by subsequent adjustment(*b*).

(*a*) Report on Public Moneys, 1857. Memorandum by the Chancellor of the Exchequer, Appendix, No. 1.

(*b*) *Ib.* Draft Report of Sir F. Baring, and evidence cited, Appendix, No. 3.

Another difficulty in securing an effectual control by the Comptroller-General of the appropriation of issues, is that part of it is necessarily issued by way of *advance*. The moneys drawn from the Exchequer are applied partly to final payments, and partly to advances or "imprests," of which an account is to be rendered subsequently. Thus such advances are made to supply the "Treasury Chest Fund," which provides means of carrying on the public service abroad, for which it is clear that funds must be provided before the exact application of them can be known.

For these and other reasons, the control of the Exchequer over the application of the public money has been deemed incomplete, and it was proposed to the Committee on Public Moneys of 1857, on high authority, that the Exchequer should be entirely abolished, and that in its place extended powers should be given to the Board of Audit, which will be described hereafter. The proposal was not adopted by the committee, but they recommended in their report various provisions for the audit of accounts of appropriation; and since the report was made, the powers of the Audit Board with respect to accounts showing the appropriation of Parliamentary votes, have been enlarged, as will be shown under the next division of this chapter.

Another recent measure for securing a more effectual control of the public money is the Act of 1861, for limiting and regulating the Treasury Chest Fund(*a*). The Act recites that this fund has been employed as a banking fund for facilitating remittances, and for temporary advances for public and colonial services, to be repaid out of money appropriated by Parliament, or otherwise applicable for the purpose. The Act provides that only a limited sum shall be so used, that the surplus shall be paid into the consolidated fund, and that accounts of the Treasury Chest Fund shall be audited and laid before Parliament.

The Comptroller-General lays before Parliament annually accounts of all moneys received into the Exchequer

(*a*) 24 & 25 Vict. c. 127.

under the several heads of public revenue—the amounts of the Royal orders and Treasury warrants—of the issues pursuant thereto, and the balance at the Bank to the account of the Exchequer at the close of each year. (1 Will. IV. c. 15, s. 23.)

3. *Audit.*—At a very early period of the history of the Constitution, it was not unusual for Parliament to appoint or require the appointment of auditors of public accounts. Thus, in 14 Edw. III., A.D. 1340, certain persons were assigned by Parliament to take accounts of the receipt and expenditure of certain Parliamentary grants. In 1380, commissioners were appointed by Richard II., at the prayer of the Commons, to examine the expenses of the Royal household. In 7 & 8 Hen. IV., A.D. 1406, the Commons require that certain auditors may be appointed to examine the accounts of the Treasurers of War(*a*). After the Restoration of Charles II., and in subsequent reigns, it was a frequent practice to appoint special commissioners by Acts of Parliament for taking the public accounts(*b*).

In 1785, a permanent Board of Commissioners, for auditing the public accounts, was constituted by 25 Geo. III. c. 52, in the place of certain officers of the Exchequer who had previously discharged the duties of auditors. All the accounts which had previously been audited in the Exchequer were thenceforth to be audited by the new Audit Board; and the public officers to whom money was issued from the Exchequer by way of advance, or imprest for the

(*a*) 3 Hatsell, 101.

(*b*) "At the same time the Queen [Anne] passed a Bill for receiving and examining the public accounts, and in her speech she expressed a particular approbation of that bill. A commission to the same effect had been kept up for six or seven years during the former reign, but had been let fall for some years; since the commissioners had never been able to make any discovery whatsoever, and so had put the public to a considerable charge without reaping any sort of fruit from it. Whether this flowed from the weakness or corruption of the commissioners, or from the integrity or cunning of those who dealt in the public money, cannot be determined." (Burnet, Hist. of his own Times, A.D. 1702.)

public services (principally naval and military services), were required to transmit to the Audit Board accounts of such issues. By subsequent statutes the additional duties were assigned to the Audit Board of auditing the accounts of the Woods and Forests, and Land Revenues and Public Works(*a*).

By the Act for regulating the Exchequer, to which we have frequently referred, the Comptroller-General is required to transmit to the Audit Board quarterly statements of all issues by the Exchequer for the public service(*b*). The Audit Board had by this enactment, and by the other Acts relating to the public accounts which have been already cited, power to audit the amounts drawn out for the public service, but had no general power of examining the manner in which those amounts were actually *appropriated.* For reasons already explained, it might and did happen that amounts issued by the Exchequer for one service were appropriated to another. There was, therefore, no effectual audit of the appropriation of public money. This defect has now been partially remedied in a manner which we proceed to explain.

Appropriation Audit.—Until the year 1832, the Audit Board had no power of auditing in detail the expenditure either for the naval or military services. In that year an Act was introduced by Sir James Graham, 2 & 3 Will. IV. c. 40, by which provision was made for submitting to Parliament annual accounts of naval receipts and expenditure, audited by the Audit Board(*c*). In 1846 an Act was passed,

(*a*) 39 Geo. III. c. 83; 2 Will. IV. c. 1, s. 12; and 14 & 15 Vict. c. 42.

(*b*) The times up to which the quarterly accounts of the receipt and expenditure of the United Kingdom, according to the receipt and issue of money at the Exchequer, are to be made up, are now regulated by 17 & 18 Vict. c. 94, s. 3.

(*c*) Sir James Graham showed, in a speech in the House of Commons in 1832, that the practice had extensively prevailed in the naval departments, of appropriating to various naval services Parliamentary grants which Parliament had not authorized to be so applied. (The Life and Times of the Right Hon. Sir James R. G. Graham, Bart., C.C.B., M.P. By Torrens M'Cullagh Torrens. 8vo. Lond. 1863, p. 411.)

9 & 10 Vict. c. 92, for auditing the accounts of the appropriation of moneys granted for naval and military services, and it was provided that yearly accounts of the receipt and expenditure for naval, army, commissariat, and ordnance services of each year, *classed under the several heads expressed in the Appropriation Act of each year*, should be audited by the Audit Board; and that the accounts, together with the reports of the Board thereon, should be laid before Parliament.

This system of appropriation audit was extended by an Act of 1861, 24 & 25 Vict. c. 93. This Act recites the provision made by the last-mentioned Act for the audit and presentation to the House of Commons of accounts of the appropriation of moneys granted for naval and military services, and that it is expedient that accounts of the appropriation of moneys voted for the expenses of the departments of Customs, Inland Revenue, and Post-Office, should be similarly audited and presented to the House of Commons; and provides that accounts showing the appropriation of moneys granted by Parliament for the services of the last-mentioned departments, shall be similarly audited by the Audit Board, and laid before the House of Commons annually.

In considering the general system of receiving, issuing, and auditing the accounts of the public revenue, it has not been necessary to explain the present constitution of several principal fiscal offices; some particulars respecting their powers and duties remain to be considered.

The Treasury.—It has been already stated that the Treasury became separated finally from the Exchequer at the Restoration. The practice of putting the office of Lord Treasurer in commission,—that is, of appointing commissioners to execute his offices,—originated somewhat earlier. The first King under whom the Treasurer's office was put in commission, in 1612, was James I., by whom the Earl of Northampton and four others were made commissioners.

This required the adoption of written documents for the satisfaction of the officers of the Exchequer, who could not take verbal orders from a plurality of persons, and thus arose the practice of Treasury warrants. During the reign of Charles II., and after the Revolution, the office of Lord Treasurer was discharged sometimes by a single person, and sometimes by commissioners(*a*). In the reign of Queen Anne, Lord Godolphin, the Earl of Oxford, and the Duke of Shrewsbury successively received the Treasurer's staff; but the latter was the last Lord High Treasurer. Since the accession of George I., in 1714, the office of Treasurer has always been executed by commission(*b*).

The number of commissioners has varied from time to time. By the Consolidated Fund Act, 56 Geo. III. c. 98, which united the offices of the Lords High Treasurers of Great Britain and of Ireland, power was given to increase the number of commissioners.

This commission is by patent under the Great Seal, and nominates commissioners "for executing the offices of Treasurer of the Exchequer of Great Britain and Lord High Treasurer of Ireland." The commissioners are empowered to exercise all the powers of Commissioners of the Treasurer, subject to the modifications of those powers by the Act 56 Geo. III. c. 98, for consolidating the revenues of Great Britain and Ireland. By the patent, the authority of the commissioners may be exercised by *any two or more of them*(*c*). Similarly, by a modern statute(*d*), every in-

(*a*) When Lord Southampton was Treasurer, in the reign of Charles II., the King told his Chancellor, Clarendon, that he was resolved not to appoint another Treasurer, but to put the office in commission, as Cromwell had done. After the decease of Southampton, the King again informed Clarendon of his resolution to appoint Commissioners of the Treasury. On both occasions Clarendon strenuously opposed the resolution, principally on the ground that the responsibility of the office would be weakened by dividing it, and that "the dignity of the person of the Treasurer" was most necessary for the King's service. (Continuation of Life of Clarendon, pp. 324, 416.)

(*b*) Thomas, History of Public Departments, 4, 20.

(*c*) A copy of the Commission, dated in 1853, is given in the Report to the House of Commons on the Admiralty in 1861, p. 657.

(*d*) 12 & 13 Vict. c. 89.

strument or act required by Act of Parliament or otherwise to be issued, or done by or under the hands of the commissioners, may be issued or done by or under the hands of any two of them.

The Treasury Board now consists of the First Lord of the Treasury, who is considered the highest officer of the administrative government, and is popularly designated Prime Minister, the Chancellor of the Exchequer, and three junior Lords.

The Chancellor of the Exchequer is an ancient officer, who appears to have been originally appointed in the manner already mentioned as a check upon the Treasurer(*a*). The Chancellor of the Exchequer was formerly a principal officer both of the Court of Exchequer and the Receipt of Exchequer; but he has now very little connection with the former, and is not included in the modern constitution of the latter.

When the Court of Exchequer sat as a Court of Equity, it was held before the Lord Treasurer, the Chancellor of the Exchequer, and the Barons of the Exchequer; but the common law jurisdiction was exercised by the Barons only. As late as 1735, Sir Robert Walpole sat judicially in the Exchequer, and gave judgment in a case in which the Barons were equally divided. At present, the only occasion on which the Chancellor of the Exchequer takes his seat in the Exchequer is on the annual nomination of sheriffs, when he sits first of all the judges who assemble on that occasion(*b*).

The Chancellor of the Exchequer is one of the Lords of the Treasury, but upon a vacancy of his office, the seals of it are delivered to the Chief Justice of the King's Bench for the time being, who performs the judicial duties of the office until a successor is appointed. We have already observed(*c*) that it thus happened that Lord Mansfield was

(*a*) *Ante*, p. 525.
(*b*) Thomas, History of Public Departments, 11, 12.
(*c*) *Ante*, pp. 195, 526.

locum tenens of the Chancellor of the Exchequer for more than three months in 1757. He was again in the same position ten years after. Lord Chief Justice Denman similarly held the office for some days in 1834. The reason for assigning the office to the Lord Chief Justice, upon the resignation of the Chancellor, is, that there may be no interruption in sealing writs which issue daily from the Court of Exchequer, and other instruments for which the signature of the Chancellor of the Exchequer is constantly required.

He now holds, and has long held, the office of Under-Treasurer, by a patent distinct from that of Chancellor of the Exchequer. The office of Under-Treasurer existed at least as early as the reign of Henry VI. It was the duty of this officer to make various declarations to the Crown of the state of the Revenue, and to join with the Treasurer in orders for issuing money out of the receipt of the Treasury, and in other acts usually done by the Treasurer and Under-Treasurer jointly. It appears by the Book of Oaths(*a*) that the Under-Treasurer is sworn "to serve the King in the Exchequer, and in the receipt of the same; and to survey and order the receipts of all sums of money paid to the King's use in the said receipt, and the issue of the same."

The most important part of the duties of the Chancellor of the Exchequer are his Parliamentary duties, with reference to his annual statement to the House of Commons of the financial condition of the kingdom, and the progress of Money Bills and Tax Bills through that House. His executive duties in the Treasury do not appear to be very heavy, and neither he nor the First Lord often attends the Treasury Board. Where, however, important general orders for the regulation of other departments subordinate to the Treasury have to be made, it is apprehended that both the First Lord and the Chancellor of the Exchequer would necessarily be consulted.

The duties of the junior Lords of the Treasury are prin-

(*a*) Cited by Lord Somers; Banker's Case, 14 State Trials, 67.

cipally formal(*a*). The most important and heaviest part of the executive functions of the Treasury devolves upon the secretaries. By the Treasury Patent above referred to, the powers of the several commissioners are equal; but in practice, the power of the Junior Lords is far inferior to that of the First Lord and the Chancellor of the Exchequer. The First Lord rarely, if ever, attends the Treasury Board; nor does the Chancellor of the Exchequer attend, except on taking a loan. The Treasury now seldom meets as a Board, and on the few occasions when it does so, it is constituted by the Junior Lords(*b*).

The duties of the Treasury, so far as it is necessary here to consider them, may be divided into three kinds:— 1. Those relating to the public money. 2. Control of other departments. 3. Patronage.

1. Some particulars may be properly added here to those already given respecting the fiscal duties of the Treasury. The supplies for the army and military and civil service are, as we have seen, issued under the authority of the Treasury. That department also, by various statutes, regulates in many cases salaries of newly-created officers in other departments, and the number of officers in the establishments for new branches of the public service. Other duties of the Treasury consist in the examination of expenses of legal establishments, sheriffs, the county courts, and criminal prosecutions. The part of the duties of the Treasury which relate to expenditure is chiefly discharged by the assistant secretary.

All payments for civil salaries, allowances, and incidental charges payable in England, and all payments for the army, navy, and ordnance are made upon the special authority of the Treasury by the *Paymaster-General*(*c*).

(*a*) Mr. Canning is said to have described the duties of Junior Lords of the Treasury to be, "to make a House, to keep a House, and to cheer the Minister." (Report to H. of Com. on Admiralty, 1861, No. 972.)

(*b*) Report to H. of Com. on Admiralty, 1861, Nos. 1271, 2570, 3213.

(*c*) Under 4 & 5 Will. IV. c. 15, a paymaster of civil services was ap-

2. The Act 56 Geo. III. c. 98, which united the offices of Lords High Treasurers of Great Britain and of Ireland, provided that all officers employed in collecting and managing the public revenue shall be "in all respects subject to the control of such Lord High Treasurer or Commissioners of his Majesty's Treasury." The Board of Customs, Inland Revenue, and the Post-Office are thus subject to the general authority of the Treasury. The Office of Woods and Forests now discharges many of the duties which formerly devolved upon the Treasury, but is subject to its regulations. The establishments of colonial and other offices are also subject to the control of the Treasury with respect to their expenses.

3. The ecclesiastical and civil patronage of the Treasury is very extensive. The Church patronage of the Crown (except that which belongs to the Lord Chancellor) is generally disposed of upon the advice of the First Lord of the Treasury, and includes the highest offices in the Church; but he never disposes of any important preferments without taking the pleasure of the Crown. Diplomatic and colonial appointments are made by the Secretaries of State for Foreign Affairs and the Colonies respectively; but on all important appointments they confer with the First Lord of the Treasury (*a*).

Woods and Forests and Public Works.—The principal part of the Royal revenue, as we have had occasion to observe, consisted in ancient times of the rents of lands. These were partly lands of *ancient demesne* reserved to the Crown at the Conquest, and partly of lands subsequently acquired by for-

pointed for the payment of salaries and charges formerly payable in detail at the Exchequer. By 5 & 6 Will. IV. c. 35, the duties of making all payments for the army, navy, and ordnance, were consolidated in the office of a Paymaster-General. The Act 11 & 12 Vict. c. 55, transferred to this Paymaster-General the duties of paymaster of the civil services, and consolidated the two offices.

(*a*) Evidence before the Committee of the House of Commons on Official Salaries, 1850.

feitures and other means. The estates of the Crown were greatly diminished by the lavish grants of the successors of the Conqueror, and Parliament frequently interposed to compel the resumption of grants thus made. Such Acts of resumption were passed in almost every reign during the twelfth, thirteenth, and fourteenth centuries. In the reign of Henry VIII. the real estate of the Crown became greatly increased by the seizures of the estates of monasteries, but a great part of those estates were alienated by the same King. Queen Elizabeth disposed of part of the Royal domains to avoid demanding supplies from Parliament; but at the time of the accession of James I. the Crown had still very extensive estates over all England, and most of the great families of the nation were, says Burnet, tenants of the Crown, and a great many boroughs were depending on the estates so held(*a*). By the profusion of James and his successors, the Royal estates were reduced to comparative insignificance, and no effectual restraint of alienation of them was imposed by Parliament until the time of Queen Anne, when it was enacted that all future grants of land by the Crown should be for limited periods, and subject to strict conditions as to the reservation of rent.

We have explained in a former chapter that the revenues of the Crown are now almost entirely surrendered and consolidated with the rest of the public revenue, out of which the Royal Civil List is paid. It is not intended to trace here the history of the numerous changes which have been made by various statutes in the offices having the management of the Crown lands(*b*). It will be sufficient to observe that the modern administration of the land revenue is

(*a*) History of his own Times, book i.

(*b*) Henry VIII., by Act of Parliament, erected a Court of General Surveyors of King's lands, an institution which consolidated into one body all the offices relating to the land revenue; but this office was abolished in the latter part of the same reign. Subsequently the land revenues were managed by particular surveyors of counties and districts, until the reign of James I., when the office of Surveyor-General was constituted, nearly in the form in which it subsisted until the constitution of the Board of Woods and Forests. (St. John, Observations on the Land Revenue of the Crown, ch. 5.)

founded upon an Act of 1810 (50 Geo. III. c. 65), by which a board was established called "the Commissioners of his Majesty's Woods, Forests, and Land Revenue." In 1829, an Act (10 Geo. IV. c. 50) was passed which consolidated the law relating to the management of the Crown lands. That Act abolished a great number of previous enactments on the subject, and directed that the hereditaments of the Crown (except advowsons and vicarages) in England, Wales, and Ireland should be under the management of the Commissioners of Woods and Forests, and their successors. The Crown lands in Scotland were placed under the same management by a later Act, 2 & 3 Will. IV. c. 112. The Act of 1829 gave the Commissioners large powers with respect to the sale and leasing of Crown lands, and provided (s. 113) that the annual land revenues should, subject to certain deductions, be carried to the Consolidated Fund during the King's life. This transfer to the Consolidated Fund was the result of a special arrangement with the King, terminating with his life, but has been renewed, as we have seen, by his successors.

A considerable addition to the duties of the Commissioners of Woods and Forests was made by the Act 2 Will. IV. c. 1, which assigned to them the duties previously exercised by other officers of the Crown, of superintending and controlling *public works and buildings*, of which the expenses are defrayed out of the Crown revenue or Parliamentary grants. By this union of the department of Woods and Forests with that of Public Works, the duty devolved upon the consolidated board of superintending the erection and repair of Royal palaces, the buildings used for various branches of Government, and the management of public museums and parks.

In 1851 another administrative change took place. It was found that, in consequence of the public works being under the same control as the revenue derived from the property of the Crown, this revenue was applied with too much facility to the execution of public works and improve-

ments; the Exchequer was deprived of the funds which were due to it in exchange for the Civil List, and Parliament was denied its proper control over an important branch of public expenditure. To arrest this evil, the department of Woods and Forests was again separated from that of Public Works(*a*). The Act 14 & 15 Vict. c. 42, by which this separation is effected, continues the powers of the Commissioners of Woods, Forests, and Land Revenues, except those powers which are transferred to the new Board of Works and Public Buildings. This Board consists of a First Commissioner, specially appointed, together with the Secretaries of State, and the President and Vice-President of the Board of Trade, who are *ex officio* commissioners. The duties with respect to public works and buildings, which were annexed in the reign of William IV., in the manner above described, to the office of Woods and Forests, are transferred to the new Board of Works; to which also were assigned various powers with respect to certain public parks, and the powers which by several Acts had been given to the Commissioners of Woods and Forests with respect to the making various new streets and roads, and other public works and structures in London and elsewhere. We have already stated that under the Act here cited the Commissioners of Woods and Forests, and the Board of Works and Public Buildings, are required to transmit annual accounts of the receipt and expenditure of their respective departments, to be audited by the Commissioners for auditing Public Accounts.

(*a*) May's Constitutional History, 213.

CHAPTER VIII.

MILITARY AND NAVAL OFFICES.

THE jealous protection of national liberty provided by the British Constitution is nowhere more conspicuously displayed than in the laws regulating the maintenance of the military and naval forces of the kingdom. At first sight, it appears by no means easy to reconcile the two conflicting conditions required for the proper constitution of military forces—their absolute obedience to the Executive on the one hand, constitutional control by the Legislature on the other. The one condition is necessary to the effectiveness of the army and navy, the other to the liberty of the people. The means by which these conflicting conditions are reconciled by our Constitution we have already had occasion to consider in part, and shall more fully discuss in the present chapter.

It is obvious that the liberties of the nation are much less liable to attack by a naval than by a military force. Accordingly, the former is much less jealously controlled by Parliament than the latter, for the navy is by law permanently established; while the power of maintaining the army is only temporary, and requires annual renewal by Act of Parliament.

Before considering the present government of the army and navy, it will be instructive to refer to a few particulars of their ancient constitution, and the gradual progress of the principles upon which their constitution is now settled.

The constitutional military forces of England soon after the Conquest consisted of feudal troops and the *posse comitatus*. The feudal troops were tenants of the Crown, or their vassals or under-tenants, who were obliged by their tenures to render military service both at home and abroad. The *posse comitatus* consisted of inhabitants of counties required to keep the peace within them, and to repel invasions; but not to serve abroad, nor in general to go out of their own counties.

Besides these constitutional forces there were in English armies and garrisons at all times, from the Conquest downwards, stipendiary troops, both national and foreign. They were paid partly out of the privy purse, and partly out of the feudal revenues of the Crown. The foreign troops were called in by several kings in their disputes with the great barons. From the time of Edward III., when it became customary for our kings to engage with their subjects by indentures to furnish soldiers at certain wages, most of our armies consisted of stipendiary troops. These were kept up only in time of war; and except garrisons and the small corps who formed the body-guards of the Crown, rather for the purposes of state than for military purposes, there were no permanent soldiers in England before the Civil War in the reign of Charles I. The standing army originated in England after the Restoration, and the most ancient corps of the present standing army are some regiments of Guards which were raised by Charles II., and were partly formed from corps raised during the civil wars. At the Revolution the military constitution was remodelled by Mutiny Acts, under which, with a few accidental intervals between the expiration of one Mutiny Act and the enactment of its successor, the army has continued ever since(*a*).

(*a*) Grose, Military Antiquities, ch. 4.

By 18 Edw. III. stat. 2, c. 7, men-of-arms, hoblers, and archers, chosen to go in the King's service out of England, shall be at the King's wages from the day they depart out of the counties where they were chosen till their return. By 25 Edw. III. stat. 5, c. 7, no man shall be constrained to

The system of maintaining the army under temporary Acts of Parliament was adopted at the commencement of the reign of William III. (*a*); and the Bill of Rights, passed in the same session, declared "That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law." For a long while afterwards the renewal by Parliament of the powers of the Crown to maintain a standing army was always the occasion of much opposition. In 1697, a message of the King to Parliament, telling them that in his opinion a standing land force was necessary, was received with great dislike by the House of Commons, and they resolved on disbanding a large part of the army, and reducing the forces to a number which was finally settled at 10,000. The King, who was much attached to his Guards, who came with him to England, sent a message to the House of Commons, to the effect that he was prepared to dismiss these Guards, "unless, out of consideration to him, the House be disposed to find a way for continuing them longer in his service, which his Majesty would take very kindly." The House however firmly, but respectfully, declared that they could not consent "without doing violence to that Constitution your Majesty came over to restore and preserve" (*b*).

The renewal of the Mutiny Act was strongly opposed in both Houses of Parliament in succeeding reigns, as an

find men-at-arms, hoblers, nor archers, other than those which hold by such services (*i. e.* by the military tenures referred to in the text), if it be not by common assent and grant made in Parliament.

It appears from the statute 18 Hen. VI. cc. 18, 19, A.D. 1439, that at that time the Crown raised military forces by Captains, who were bound by indentures to serve with specified numbers of men, and to pay them wages; and that gross abuses were practised by the Captains in abating the pay of their soldiers.

(*a*) By 1 Will. & Mary, sess. 2, c. 4, "An Act for punishing officers or soldiers who shall mutiny or desert their Majesties' service, and for punishing false musters."

(*b*) Burnet, Hist. of his own Times; note, p. 653 of the edition, London, 1850.

encroachment upon the liberties of England, by establishing martial law(*a*). In the Acts which passed, down to the commencement of the reign of Anne, the Articles were few in number, and some of them ill-defined. But in Anne's reign many new Articles were inserted, and others have since been added as the want of them became apparent, and the Mutiny Act now constitutes an extensive code of martial law.

The Act is now rarely altered in any particular from year to year, except that in the preamble the number of forces for each year is specially mentioned. It is observable that the Act contains no provision for raising such forces, which is tacitly left to be done by the Royal prerogative, but simply recites the number of troops which it is expedient to raise. The preamble repeats the declaration of the Bill of Rights of the illegality of maintaining a standing army in time of peace without the consent of Parliament. Another declaration of the preamble is similar to that of 25 Edw. III. stat. 5, recited in the Petition of Rights of 3 Car. I., viz. "that no man should be forejudged of life or limb against the form of the Great Charter and the law of the land."

The preamble of the Mutiny Act is well worth considering, on account of its constitutional importance. Its modern form is as follows:—

"Whereas the raising or keeping a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law: And whereas it is adjudged necessary by her Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom, the defence of the possessions of her Majesty's Crown, and the preservation of the balance of power in Europe, and that the whole number of such forces should consist of [a number which varies from year to year]: And whereas no man can be forejudged of life or limb, or sub-

(*a*) See 2 Smollett's Hist. of Eng. 367; reign of Geo. I.

jected in time of peace to any kind of punishment within this realm by martial law, or in any other manner than by judgment of his peers, and according to the known and established laws of this realm; yet nevertheless, it being requisite for the retaining of all the before-mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny or stir up sedition, or shall desert her Majesty's service, or be guilty of crimes and offences to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow: Be it therefore enacted," etc.

The Act provides that the Queen may make Articles of War for the government of the army, but that no person in this kingdom shall be subject by such articles to punishment extending to life or limb, or penal servitude, except so far as the Act allows. The Act strictly defines what persons are subject to its provisions. These are commissioned and non-commissioned officers and enlisted soldiers (except those belonging to the Indian forces), and certain other persons in the military service, including various civil officers while serving with the army, or in military establishments. The Militia forces, Yeomanry, and Volunteer corps are not in general subject to the Mutiny Act, except so far as it is extended to such corps by the Acts regulating them.

The Act proceeds to make various provisions for the constitution and conduct of courts martial, and the punishment of military offences. When such offences are to be punished by penal servitude either at home or abroad, the sentences are required to be communicated by the proper military authorities to judges of the superior courts of justice, who have jurisdiction to make orders for the penal servitude of the offenders, and the sentences are carried into execution as if they were sentences of the ordinary courts of justice. To the Secretary-at-War is given the general control of military prison and prisoners. Various provisions are also made respecting the enlistment, convey-

ance, and quartering of soldiers. The Act provides that nothing contained in it shall exempt any officer or soldier from being proceeded against by the ordinary course of law for felony or misdemeanour; and any commanding officer who wilfully neglects to assist the officers of justice in arresting officers or soldiers under their command, accused of such offences, is liable to be cashiered.

The Articles of War authorized by the provisions of the Mutiny Act just mentioned, define a large number of offences, and annex to them various punishments not extending to life and limb. These articles are framed from time to time at the pleasure of the Crown, and thus materially differ from the articles of the navy, which are directly enacted by Parliament, and contain a complete code of laws of naval discipline. Blackstone remarks that "from whence this distinction arose, and why the Executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason, unless it proceeded from the permanent establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year, and might therefore with less danger be subjected to discretionary government. But whatever was apprehended at the first formation of the Mutiny Act, the regular renewal of our standing force at the entrance of every year has made this distinction idle"(*a*).

The administration of military affairs is distributed among

(*a*) 1 Commentaries, 420.

The annual renewal of the Mutiny Act has been a frequent theme of eulogium among writers on the Constitution. It may however be reasonably doubted whether constitutional liberty gains any real addition to its security by an annual repetition of all the clauses of the Mutiny Act. The only part of it of which the annual repetition is essential, is the enumeration of the number of troops. This opinion seems warranted by the consideration that though the navy has a permanent Mutiny Act, the amount of naval force is as much under the control of Parliament as is that of the army.

various executive offices, which are of two kinds, civil and military: the former providing for the subordination of the army to the executive, and superintending all the civil relations of the army; the latter having the immediate military government of the army.

A great alteration of the constitution of the offices by which the civil affairs of the army are administered, was effected in the years 1854–5. Previously to describing the changes then made, it will be convenient to refer to the former administration of the army. The departments upon which the duties of that administration devolved were principally that of the Secretary of State for War and the Colonies—that of the Secretary-at-War—the Ordnance Office—the Commissariat—and the office of the Commander-in-Chief.

Up to the year 1854, as has been already stated in the chapter relating to the secretarial departments, the Secretary of State for the Colonies was Secretary of State for War also. The orders of the Executive Government as to the employment of military forces were communicated to the military authorities either by this Secretary or the Secretary of State for the Home Department, who communicated with the Commander-in-Chief and the Master-General of the Ordnance on all points connected with the internal defence of the country, and the protection of its foreign possessions. The Colonial Secretary submitted to the Crown the advice of its ministers as to the military force to be kept up, and made known to the Commander-in-Chief the establishment thus decided upon. In time of war, the Secretary of State for War and the Colonies corresponded with officers in command on foreign service, and conveyed to them the orders of the Executive Government(*a*).

(*a*) The account of the former administration of the army, given in this and following paragraphs, is almost entirely abstracted from the statutes cited, and the Report, in 1837, of Commissioners appointed to inquire "into the practicability and expediency of consolidating the different departments connected with the civil administration of the army."

The *Secretary-at-War* had principally financial duties, which consisted in preparing and submitting to Parliament the army estimates, and in checking the details of military expenditure. The expenditure of the sums granted by Parliament for the army was sanctioned by warrants signed by the Secretary-at-War, and addressed to the Paymaster-General. The accounts of regimental paymasters and other officers charged with payments of different parts of the service, were examined and audited in the office of the Secretary-at-War.

The financial duties of the Secretary-at-War are principally regulated by statute. By 23 Geo. III. c. 50, the Secretary-at-War is required to form estimates of the charges of the annual services of the army, and to transmit copies of the estimates, when agreed upon, to the Paymaster-General; to whom also he is required to transmit accounts of the officers and privates in each corps of the army, and estimates of money required for recruiting, and other army expenses. The paymaster of every regiment is required to transmit to the agent of the regiment accounts of its expenditure; and the agent makes up annual accounts of the receipts and expenditure of each corps at home or abroad, and transmits them to the Secretary-at-War. In his department these accounts are examined, and they are thence transmitted to the Paymaster-General, with certificates of the several charges allowed in them.

Besides his financial duties, the Secretary-at-War had certain duties of attending to the due execution of military law, and as to appointments in the army. With respect to these appointments, however, his duties were almost formal; and the power of recommending such appointments to the Crown belonged, as it still belongs, to the Commander-in-Chief. The Report of 1837, above cited, refers to disputes which had recurred at frequent intervals during many years between the departments of the Secretary-at-War and the Commander-in-Chief, as to the extent of their respective duties and authority.

The *Ordnance Office* had two distinct classes of functions. These were, firstly, those of the Master-General of the Ordnance, who was the head of the Department; and, secondly, those of the Board, of which the legal designation was—"the principal officers of her Majesty's Ordnance" (*a*).

The Master-General of the Ordnance directed, personally, and without the assistance of the Board, all those matters with reference to the Corps of Artillery and Engineers, which, as to the rest of the army, belonged to the Commander-in-Chief.

Independently of these military duties of the Master-General, there were important civil duties which devolved upon the whole Board, and related to the whole army and navy. The Board superintended the supply of artillery, arms, and ammunition to both services, and had the custody, and was charged with the supply, of military stores and army clothing. The Board also superintended the construction and repair of fortifications, military works, and barracks.

The powers of the Board of Ordnance with respect to the purchase of land for public service, were consolidated by the Act 5 & 6 Vict. c. 94, which empowered the Board to purchase, either by agreement with the owners or compulsorily, "any land, buildings, or other hereditaments or easements, wanted for the service of the Ordnance Department, or for the defence of the realm."

The *Commissariat* was a branch of the Treasury charged with the supply of provisions and forage to the troops abroad, and the means of transport. In making purchases and contracts, the Commissariat officers were subject to the immediate supervision of the Treasury, and the Commissariat officers on foreign stations corresponded directly with that Board. The duties of the Commissariat will be further described when we come to the consideration of the present constitution of the military departments.

(*a*) 5 & 6 Vict. c. 94.

The supreme military administration of the whole army, excepting the Artillery and Engineers, belonged to the *Commander-in-Chief,* whose department superintended the employment, organization, instruction, and discipline, of the troops. The functions of the Commander-in-Chief were exercised, as we have stated, in correspondence with the Secretaries of State for the Colonies and for the Home Department, but principally with the former. The relations of the Commander-in-Chief to the Civil Government will be more fully explained in the account of the present administration of the army, which we now proceed to give.

The important changes in the administration of the army which took place in 1854–5, were effected principally in deference to public dissatisfaction respecting the management of the British forces then engaged in the war with Russia. The maladministration of the army had been the subject of complaints both in and out of Parliament on several previous occasions during the present century, and one effect of such complaints had been the appointment of a Commission of Inquiry in 1837. That Commission considered the chief defect of the administration of the army to be the want of an efficient control over the whole military expenditure of the country by some one authority, responsible both for the amount of the expenditure, and for the manner in which the sums voted by Parliamant were applied.

War Office.—The changes of 1854–5 consisted in the appointment of a separate *Secretary of State for War*—the consolidation of the civil administration of the army by transfer to his office of duties, which had previously been exercised by distinct departments, and a consolidation of the military administration of the army by a similar transfer to the office of the Commander-in-Chief(*a*).

The Secretary of State for War was first appointed in 1854. The appointment has since that time been usually made by letters-patent, which grant to this Secretary of

(*a*) The particulars of the changes of military administration described

State the administration and government of the army and land forces, and also of the ordnance, excepting the *military* command and discipline of the army and land forces, and appointments and promotion in the same.

It will be convenient to state, first, the nature of the transfer of civil offices to this Secretary which took place at the period in question, and then the changes which took place in the office of the Commander-in-Chief, and in his relations to the Secretary of State. The establishment of the new Secretariat of State was settled by an Order in Council, of 11th August, 1854, adopting a schedule, which recites that the new department of war had been "established upon the alleged necessity of combining and amalgamating under one Secretary of State all the divisions of the present military superintendence and details, hitherto carried on in distinct offices."

Before the union here referred to was accomplished, the civil administration of the army was divided (in the manner just described) among the offices of the Secretary of State, the Secretary-at-War, the Ordnance Office, and the Commissariat.

In 1855, the office of Secretary-at-War was consolidated with that of Secretary of State for War, by a commission appointing the latter to be also Secretary-at-War. The department thus constituted is the existing War Office. In the same year, the civil duties of the Board of Ordnance were transferred to this new war department, and the Board of Ordnance was abolished. By the statute 18 & 19 Vict. c. 117, all the statutory powers and estates vested in "the principal officers of her Majesty's Ordnance" were transferred to the Secretary of State for the War department.

The Commissariat department was partially transferred to the War Office: This partial transfer of the Commissariat arose from the double nature of its duties, which relate

in this and following paragraphs, are taken almost entirely from a Report to the House of Commons on Military Organization, 1860, and the evidence accompanying that Report.

partly to army supplies, as has been mentioned in a previous page of this chapter, and partly to finance. With respect to the former part of its duties, the Commissariat is now under the direction of the War department; and with respect to the latter, of the Treasury. In its financial capacity the Commissariat has custody of large sums of money, and doles them out, under fixed regulations, to regimental paymasters, Ordnance storekeepers, and other accountants. Officers of the Commissariat attached to every station throughout the world, render directly to the Audit Office, at the close of each month, accounts of the whole of their cash and store transactions. In time of war, all the expenditure connected with every department of an army in the field abroad, except that which is provided for in the ordinary Parliamentary estimates, is conducted by the officers of the Commissariat.

Commander-in-Chief.—We come now to consider the changes which have been effected in the office of the Commander-in-Chief, and the relations between his office and that of the Secretary of State. Some time before the establishment of the new War Office, the military command of the artillery and engineers, which were formerly distinct commands, was united with that of the Commander-in-Chief(*a*). In order to understand his relations to the Executive Government, it must be explained that though the Commander-in-Chief holds his office during the pleasure of the Crown, the tenure of it is in practice more permanent than the tenure of the political ministers of the Crown.

(*a*) The expression Commander-in-Chief, though here adopted for convenience, and in accordance with usage, is not strictly correct. There has been for some years, instead of a Commander-in-Chief, a "General commanding the Forces." (Report on Military Organization, 1860, p. 6.)

The appointment of a Commander-in-Chief is by patent under the Great Seal, appointing him "to be Commander-in-Chief, during our pleasure, of all and singular our land forces employed or to be employed in our service in the United Kingdom of Great Britain and Ireland," and commanding "all officers and soldiers who are or shall be employed in our land service, to acknowledge you as their Commander-in-Chief."

The appointment of the General Commanding in Chief, 15 July, 1856,

He does not resign his post on a change of administration, and his removal would not be advised to the Crown by its ministers, except in case of great necessity, such as a serious difference of opinion between him and the Secretary of State for War.

The degree of subordination of the Commander-in-Chief to the Executive Government, though a point of great constitutional importance, is involved in no little obscurity. In the patent of appointment of the Secretary of State for War, as has been already stated, there is a reservation of the military command and discipline of the army, and of appointments and promotions in the same. The extent to which this reservation precludes the Secretary of State from interfering in matters of military discipline and promotion, does not appear to be clearly defined. In the evidence before the Committee of 1860, on Military Organization, it was contended that the authority of the Commander-in-Chief was strictly subordinate to that of the Secretary-of-State; but the Committee considered that the latter exercised only a nominal supervision of the ordinary promotions of the army, and reported that he does not "interfere in any way with the ordinary routine administration of the army. That is left to the military authorities, aided by the legal knowledge of a Parliamentary officer—the Judge Advocate. The army is thus enabled to feel assured that the patronage of the army, as regards first commissions, and the ordinary promotions and appointments other than those which are self-regulated by purchase or seniority, will not be distributed with a view to political objects, or the necessities of successive governments; nor will the discipline of the army, as daily administered, vary in its character with each change in the civil department. Your Committee think that the introduction of any system

was merely notified to him by a letter from a Secretary of State, informing him that the Queen had appointed him "to serve as a General," and requiring him to obey such orders as he should receive from her Majesty, the Commander-in-Chief, or any other his superior officer. (*Ibid.* Appendix, p. 730.)

which shall shake this reliance on the part of the army, would be prejudicial to the efficiency of the service, by introducing doubt and dissatisfaction where confidence should exist"(*a*). But while the Committee thus express their approval of the present practice of giving to the Commander-in-Chief a more permanent tenure of office than the Secretary of State for War has, they recommend the establishment of rules more strictly defining "the extent of the departmental functions of the Commander-in-Chief," and a closer union of the two departments than at present exists. On this point the Committee observe, that "the separation engenders the belief that they are two distinct departments; public opinion confirms the error, and necessarily leads to divided action, if not to antagonism, on the party of military men against the supremacy of the civil power"(*b*).

NAVAL OFFICES.—A permanent Royal navy was not established until the time of Henry VII. Before that time ships required for the public service were furnished, as occasion required, at the expense of various towns and counties, each required to provide its contingent, or by ships impressed into the Royal service. Many records exist of ancient commissions from the Crown, authorizing different officers to impress both men and ships for the Royal service. These commissions were either special, addressed to particular officers and relating to particular expeditions, or were general commissions, conferring the whole Admiralty jurisdiction either on one person, under the style of High Admiral, or upon several Admirals, as the Admirals of the North and West. The following may be cited as examples of special commissions for the impressment of ships for particular purposes. In 15 Ric. II. a serjeant-at-arms is empowered to arrest and take up in certain counties so many ships, barges, and other vessels, and mariners, as should be found sufficient for an expedition to Ireland, under the King's uncle, the Duke of Gloucester. In 21 Hen. VI. a manda-

(*a*) Report on Military Organization, 1860, p. 20. (*b*) *Ibid.*, 21.

tory writ was issued to a serjeant-at-arms and others, requiring them to arrest, for the King's service, all ships and vessels capable of transporting men or horses, and all mariners in certain ports, for an expedition to Aquitaine. The general commissions to the High Admirals, or the Admirals of the North and West, empowered them to retain and arrest ships for the Royal voyages and expeditions, and mariners and men, from time to time as occasion required. Of general commissions of this kind a long series of precedents exist, from the fourteenth century to modern times. It has been a subject of much contention, however, how far these commissions authorized the compulsory arrest of ships and mariners(*a*).

Long before England had a Royal fleet, there was a great officer of State who was intrusted with the custody of the sea—the *Custos Maris*. He was not necessarily the actual commander of ships, but presided generally over the naval strength of the kingdom, and also administered justice in maritime causes. This latter duty is now performed by the High Court of Admiralty(*b*). Before the office of Lord High Admiral came much into use, it was customary to appoint two, under the character of Admirals of the North and West(*c*).

Though Henry V. has been supposed to have first formed a Royal navy, it is certain that Henry IV. possessed, as early as the year 1400, a ship of war. In 1415, the Royal

(*a*) See Sir Michael Foster's judgment in the case of pressing mariners, 18 State Trials, 1323, and the notes, *ibid.*

(*b*) Edwards's 'Jurisdiction of the High Court of Admiralty,' 8vo. Lond., 1847, p. 6.

(*c*) Foster's 'Judgment,' *ubi supra*, p. 1335. Rep. to House of Com. on Admiralty, 1861; Evidence, No. 849.

In the same Report (Evidence, No. 344), it is stated that "It appears probable that at first there were four Admirals, an Admiral of the North, of the East, of the South, of the West, corresponding to the four seas, as they were called, of England. However this may be, the first officer recorded to have been Lord High Admiral, or Admiral in full, was the Earl of Arundel and Surrey, created, in 1385, by Richard II." It does not appear what is the foundation of this conjecture of there being at one time four Admirals. Spelman, in his Glossary, *sub voce Admiralius*,

navy comprised in all twenty-seven sail. The policy respecting the Royal navy was however changed by the Government after the death of Henry V.; when, instead of increasing, one of the first acts of the Council, in the reign of his successor, was to break up that establishment, and sell the King's large ships; and it does not appear that a Royal navy was formed again until the reign of Henry VII.(*a*)

Henry VII. took steps towards providing a naval force which might be at all times ready for the service of the State, and towards forming a Royal navy. Henry VIII. carried out the designs of his father, by establishing Royal dockyards, building ships of war, and making the Royal navy a distinct service. In the third year of this King's reign, a naval expedition was set forth entirely at the expense of the King, although all the ships but one appear to have been hired vessels. In the time of Queen Elizabeth, the Royal navy of England had become considerable; but subjects were encouraged to equip ships, and engage the enemy in conjunction with the ships of the Queen. In the succeeding reigns the Royal navy continued to increase. During the Interregnum it became very formidable, and appears to have received a material improvement in respect to the skill and experience in nautical matters which the captains were required to possess(*b*).

gives a long list of Admirals, from the time of Henry III. to James I. There is no instance in that list of the Admiralty authority being divided between four, and only one instance (in 22 Edw. I.) of its being divided among three. The above statement, that the Earl of Arundel and Surrey was the first Admiral in full, is erroneous. There appears to be an instance of a sole Admiral at least as early as Edward I., and in the reign of Edward III. three Admirals in succession were expressly appointed with sole authority. (Spelman, *ibid.*)

In 6 Ric. II. the King assents to a petition of the Commons praying that the Admiralties of the West and of the North may be bounded by the same limits as in the time of the King's progenitors, and that the Admiral of the North may have guard of the sea from the mouth of the Thames northward. (3 Rotuli Parliamentorum, 138.)

(*a*) 5 Proceedings of the Privy Council, cxxxv.

(*b*) 'Collectanea Maritima,' by Chr. Robinson, LL.D., 8vo. Lond. 1801, p. 188.

It is difficult to determine when the practice of putting the Admiralty in commission commenced. As early as the year 1442, 20 Hen. VI., we find certain commissioners assigned to guard the sea (*avec certaines niefs et vesseaux nous avons assigneez pur un certain temps de garder la meer*)(*a*). How far the authority of these commissioners corresponded to that of the modern Lords of the Admiralty is doubtful. There is no doubt, however, that as early as the reign of Charles I. the Admiralty was assigned to commissioners in a manner analogous to modern practice. After the assassination, in 1628, of George Villiers, Duke of Buckingham, then Lord High Admiral, the question arose how his office was thenceforth to be executed; and by a commission, dated September 20, 1628, Lord Treasurer Weston, the Earl of Lindsey, Lord Great Chamberlain, and others, were appointed to execute the office of Lord High Admiral of England(*b*). Later in the same reign, the practice of appointing Lord High Admirals was resumed, and in 1639 the Earl of Northumberland was appointed to that office(*c*).

After the Restoration, Charles II. appointed his brother, the Duke of York, to be Lord High Admiral. The Duke remained at the head of the Admiralty until 1673, when, in consequence of his inability to take the test-oath, he was compelled to resign his commission. Burnet says the King put the Admiralty in a commission composed wholly of the Duke's creatures, so that the power of the navy was still in his hands(*d*). When James II. succeeded to the Crown, he exercised in his own person the authority of Lord High

(*a*) 5 Proceedings and Ordinances of the Privy Council, 190.

(*b*) Calendar of State Papers, Domestic Series of the reign of Charles I. 1628–29, pp. 273, 333.

(*c*) Rushworth's Historical Collections, A.D. 1639, p. 989.

(*d*) Hist. of his own Times, A.D. 1673. In the continuation of the life of Edward, Earl of Clarendon, folio ed. p. 238, it is said that after the Restoration, the management of the Admiralty "was entirely engrossed by his [the Duke of York's] servants."

"The powers which had been granted to the Commissioners of the Admiralty and Navy Boards were recalled, and the entire management was put into the hands of the Duke as Lord High Admiral, to whom three

Admiral, which was merged in him as Sovereign. Shortly after the Revolution of 1688, the Admiralty was again put into commission; and in 1690, the Admiralty being then in commission, an Act was passed vesting in the commissioners all the powers of the Lord High Admiral(*a*). In 1692 there were great complaints of the management of the Admiralty(*b*), and in that year the House of Commons, influenced probably by these complaints, resolved to humbly advise the Crown "to constitute a Commission of Admiralty of such persons as are of known experience in maritime affairs, that for the future all orders for the management of the fleet do pass through the Admiralty that shall be so constituted"(*c*).

With the exception of a few short intervals, the office of Lord High Admiral has ever since been discharged by commission. The intervals were as follows:—In 1700, the Earl of Pembroke was, for a short time, Lord High Admi-

new commissioners were appointed to act with the Treasurer of the Navy, the Comptroller, the Surveyor, and the Clerk of the Acts, as principal officers and commissioners of the Navy. . . . Great progress was made in the preparation of the Fleet, owing to the skilful management of the Duke of York and Mr. Pepys." (First Report of the Commissioners of Inquiry into the civil affairs of the Navy, cited in a speech of Sir James Graham in the H. of Com. in 1832. Torrens' Life of Sir James Graham, p. 427.)

(*a*) The statute 2 W. & M., sess. 2, c. 2, A.D. 1690, recites that the office of Lord High Admiral had for several years been exercised by commissioners appointed by the Crown, but that doubts had arisen as to the extent of their power; it is then enacted that "all and singular authorities, jurisdictions, and powers, which by any Act of Parliament or otherwise, have been or are lawfully vested, settled, and placed in the Lord High Admiral of England," appertained to the Commissioners.

Burnet says that this Act was occasioned by doubts whether the power of life and death, which by martial law belonged to the Lord High Admiral, was vested in the Commissioners. (Hist. of his own Times, A.D. 1690.)

(*b*) Burnet, A.D. 1692.

(*c*) Rep. to House of Com. on Admiralty, 1861, No. 848, where it is said, that the "first commission of the Board of Admiralty had its origin" in the Act of Parliament just cited, and that the Act remained inoperative until 1692. But that this statement is erroneous appears by the Act itself. Burnet also expressly states that the Admiralty was in commission when the Act was passed, and it is shown in the text that the Admiralty was in commission more than half a century previously.

ral. A few years after, the office was conferred upon Prince George of Denmark, the consort of Queen Anne. Burnet states that the administration of the Admiralty by that Prince was conducted by the assistance of a Council, and was so ill-managed as to give rise to a Parliamentary investigation, and an address of the House of Lords to the Queen(*a*). In 1827, the Duke of Clarence was appointed Lord High Admiral; but after a short period the office was found to be so ill-administered that the Admiralty commission was revived, and the system of putting the Admiralty in commission has continued ever since(*b*).

We proceed now to give an account of the present powers and constitution of the Board of Admiralty, which is that department of the State which conducts the administration of all the Royal navy and naval forces, at home and abroad, commands the Royal Marines, and controls all the Royal dockyards and naval establishments.

The powers and duties of this Board of Commissioners to execute the office of Lord High Admiral are described at great length in the letters-patent under the Great Seal by which the Commissioners are appointed. The following is a brief abstract of the principal provisions of the letters-patent. The Queen appoints the six commissioners therein named, or *any two of them,* to be Commissioners for executing the office of "our High Admiral of our United Kingdom of Great Britain and Ireland, and of the dominions, islands, and territories thereto belonging, and of our High Admiral of Jamaica, Barbadoes, Saint Christopher, Nevis, Montserrat, Bermudas, and Antegoa, in America; and of Guiney, Binney, and

(*a*) Burnet, Hist. of his own Times, A.D. 1707.

(*b*) Rep. on Admiralty, 1861, Nos. 846–8.

The appointment of the Duke of Clarence to the office of Lord High Admiral gave occasion to the Act 7 & 8 Geo. IV. c. 65, which provides that the powers and privileges given by any Act of Parliament to the Commissioners of the Admiralty shall extend to the Lord High Admiral, and that the signatures of any two members of his Council shall have the same effect as the signatures of any two of the Commissioners.

Angola, in Africa, and of the islands and dominions thereof; and also of all and singular our other foreign plantations, dominions, islands, and territories whatsoever, and the places thereunto belonging, during our pleasure." The commissioners are empowered to order the repairing of ships according to their discretion, and to order the building and furnishing such ships as they shall receive directions for from the Queen or Privy Council. All officers and ministers of the Crown in the navy and naval services are required to perform the orders of the Commissioners touching their office. The Commissioners are further empowered to direct the taking accounts and surveys of ships and ship stores—to establish orders for the regulation of the navy—to apply the Admiralty Droits in the manner required by law—to appoint to vacant naval offices—to appoint officers for conducting the civil departments of the naval service, and superintendents of dockyards and naval establishments—to make contracts for hire of vessels and supply of ship stores—and to give orders for payment of the expenses of the navy(*a*).

On a change of the Cabinet the Commission is revoked, and a new Commission issues; occasionally this Commission includes the name of some naval officer who was in the former Commission; but the First Lord of the Admiralty, who is a member of the Cabinet, and the majority of the other Lords, vacate their offices on a change of the Cabinet.

The powers and duties of the Admiralty are further regulated by statute. In the year 1832 an important reform was effected in the naval civil departments, by the consolidation of several of them, including the victualling department, with the Admiralty. These alterations were effectuated by the Act 2 Will. IV. c. 40, which vested in the Admiralty the statutory powers of the Navy Board and of the Board of Commissioners for victualling the Navy and for the care of sick and wounded seamen, and the powers

(*a*) Rep. to House of Com. on Admiralty, 1861; App., No. 1.

(with some exceptions) of the Treasurer of the Navy, and vested the lands and buildings formerly belonging to the two former of those departments in the Admiralty. The Act provided that not more than five Commissioners of the Admiralty should be competent to sit at one time in the House of Commons. It was also provided that any two Commissioners of the Admiralty might exercise all the powers of their office.

Among other statutory powers conferred upon the Admiralty are certain powers of managing prize-money, and making regulations for distributing prize-money and the proceeds of ships, etc., condemned under the customs laws, or as slavers or pirates(*a*); of raising, maintaining, and governing the forces employed in the coast-guard and revenue cruisers(*b*); and of controlling the construction of piers and harbours constructed under the general Acts relating to those works(*c*).

The most important business of the Admiralty is decided upon at meetings of the Board regularly summoned; but by the terms of their patent, and also by statute, as has just been mentioned, any two of the Commissioners may exercise the powers of their office, and, occasionally, Admiralty orders are made by two Commissioners, without any regular summons of the Board(*d*). The letters-patent by which the Board is constituted make no difference in the authority of the different Commissioners, but votes are never taken at the Admiralty Board as to its decisions, and by long usage the First Lord of the Admiralty has in the Board supreme authority. The maintenance of this authority ultimately depends on the tenure of the Commissioners' offices being not permanent, but during the pleasure of the Crown; in case of necessity, the Cabinet would maintain the supreme authority of the First Lord, by requiring the resignation of either of the others, or by advising

(*a*) 2 Will. IV. c. 40, ss. 19, 20; 17 Vict. c. 19.
(*b*) 19 & 20 Vict. c. 83. (*c*) 24 & 25 Vict. c. 45; 25 Vict. c. 19.
(*d*) Rep. on Admiralty, 1861, Nos. 311–21.

the Crown to revoke the Commission with respect to him(*a*). It is usual, however, for the First Lord to defer to the opinions of the professional members of the Commission on professional questions.

A considerable part of the business of the Commissioners is transacted by them separately; for this purpose, the business of the Admiralty is divided into six departments, over each of which one of the Commissioners presides. The First Lord usually does not belong to the naval profession; the duties of his department relate principally to political questions, navy estimates, promotions, and appointments. The duties of the First Naval Lord relate principally to the distribution of the fleet, and the manning and arming ships(*b*).

It will be seen that the constitution of the Admiralty differs essentially from that of the military departments. In the latter, there is no Board of Commissioners, but the supreme ministerial authority is delegated by the Crown to a Secretary of State; in the former, there is no office analogous to that of Commander-in-Chief of the army, nor any other permanent officer having the sole command of naval officers, and superintendence of naval discipline. The two systems have recently been compared, and of their comparative merits and defects very different opinions have been expressed in the evidence before the Committees on the Organization of the Army and on the Board of Admiralty, referred to in this Chapter.

The method of maintaining the discipline of the navy is by certain rules and articles first enacted by Parliament soon after the Revolution, but since new-modelled and altered by various statutes.

The recent statute, 23 & 24 Vict. c. 123, re-enacted with some alterations by 24 & 25 Vict. c. 115, now regulates the navy by a code which defines offences against naval discipline, and their punishment, and prescribes the con-

(*a*) Report to H. of Com. on Admiralty, 1861, App., Nos. 241, 999, 2807, 3840. (*b*) *Ibid.*, No. 1.

stitution and procedure of naval courts martial. The persons subject to these Acts include all persons borne on the books of Queen's ships in commission, land forces embarked on Queen's ships, and some others. But the marine forces employed in the Royal fleet are not, while quartered on shore, or on board merchants' ships, subject to the laws relating to the government of the Royal forces at sea. In order to maintain the discipline of marines, an Annual Marine Mutiny Act is passed, which enables the Commissioners of the Admiralty to make Articles of War for the government of Marines while on shore, or on merchant-vessels or transports, and this Annual Marine Mutiny Act in other respects closely resembles the Annual Mutiny Act applicable to the army.

CHAPTER IX.

LOCAL ADMINISTRATIVE GOVERNMENT.

Besides the several departments of the State upon which devolves the administrative government of the nation generally, there are numerous provincial and municipal institutions to which is assigned the local administration of civil affairs. These institutions are of great importance, constitutionally considered. In them, the principle of self-government obtains a development distinct from that observed in the central government, but constituting an essential accessory to it. Applied to the component parts of a nation, the principle of subordination of governments subjects each municipality to the common government in matters of common interest, and preserves each municipality completely independent respecting affairs affecting it alone; and this principle is obviously that which gives the greatest amount of liberty consistent with the constitution of civil society.

The most important part in the local administrative government of England is now exercised in *Cities and Boroughs* by their corporations—in various *unincorporated towns* by commissioners constituted under the authority of local Acts of Parliament—and in *Counties* by the justices in sessions.

The division of this kingdom into separate provincial and municipal governments, which managed their own internal administration, existed in a very complete manner in the

Anglo-Saxon period. Coke says that this realm was divided into shires and counties, and those shires into cities, boroughs, and towns, by the Britons, so that King Alfred's division of shires and counties was but a renovation, or more exact description, of the same(*a*). In the municipal organization of the Anglo-Saxons, the supreme military and judicial authority of the county was in the Earl, who, with a bishop or other ecclesiastical dignitary, presided over the shyre mote, or county court. But the sheriff had an independent authority as an administrative officer in the execution of judicial sentences, and the collection of the revenue of the State(*b*).

In the time of Edward the Confessor, the country was divided into shires, hundreds, towns, and boroughs; and over these districts the King's officer, called the Reeve, presided, whose principal duty consisted in preserving the peace; these *reeves* received in counties the appellation of shire-reeves, and in boroughs were designated port-reves.

After the Conquest, this independent political organization of shires and boroughs underwent considerable changes. The establishment of the Aula Regia, and subsequent changes in the judicature, greatly reduced the importance of the county courts, as we have already seen; and the Earls ceased to have much local power except in the few counties palatine in which, by special Royal grant, they exercised *jura regalia*. The conservators of the peace, chosen in full county court by the freeholders, were replaced in the reign of Edward II. by justices assigned by the King's commission(*c*), and nearly at the same time the people lost the right of electing the sheriffs or shire-reeves, and that right became vested in the Crown in the manner already described(*d*).

The counties thus lost the elective constitution of their magistracy, and they never recovered it. The boroughs,

(*a*) Co. Litt. 168 *a*.
(*b*) Merewether and Stephens, History of Boroughs, 54.
(*c*) *Ante*, p. 313. (*d*) *Ante*, p. 385.

however, obtained a popular political organization by purchase from the Crown. In consideration of the payment of stipulated Crown rents, Royal charters were issued by the Norman Kings to one borough after another, granting the boroughs to the burgesses in *fee farm*, and relieving them from the interference of Royal provosts in the collection of the King's revenue. The towns thus enfranchised resumed their former municipal organization under the administration of elective chief magistrates, designated either by the old appellations of burgh-reves, or port-reves, or in some cases of bailiffs, but in most cases of mayors (*a*). When the men of a town, corporate or not corporate, became answerable to the Crown for a *ferm* or other payment, this magistrate accounted for it at the Exchequer, and the townsmen collectively were liable to be sued for it. Generally, it was granted to the borough to elect a single chief magistrate, bearing the Norman title of mayor, who was required to be presented to the Barons of the Exchequer or other officers of the Crown, and to be accepted by them on behalf of the Crown. The chief governance of boroughs so constituted was originally in the whole body of resident trading townsmen. "They were deemed townsmen who had a settled dwelling in the town, who merchandised there, who were of the Hanse or Guild, who were in Lot and Scot with the townsmen, and who used or enjoyed the liberties and free customes of the town" (*b*). These assemblies were held for general regulation of the affairs of the community, including the enactment of bye-laws, and the levying of local taxes and tolls, so far as they had power by law to exercise those functions.

It appears by many charters of the ancient Kings of England, that the great end for which franchises were wont to be granted to towns were to amend and improve the towns; "that is to say, to enable the townsmen to live more comfortably, and to pay with more ease and

(*a*) Merewether and Stephens, Hist. of Boroughs, 359.
(*b*) Madox, Firma Burgi, p. 242.

punctualness their yearly ferme, and other duties to the King" (*a*).

But the municipal powers of self-government must have been very limited until the towns obtained the legal power and capacity of *corporations*. The old charters to which we have referred did not confer this capacity, and it appears that the first charter of incorporation granted to a municipal body was granted in the reign of Henry VI., A.D. 1439, to the town of Kingston-on-Hull (*b*). Though after that time some few places received charters which did not incorporate them, the old forms of municipal charters soon became entirely superseded by charters of incorporation. The effects of these latter were to give the grantees power to sue and be sued as a single body, to take and grant lands, and to enjoy all their rights, privileges, and possessions by perpetual succession. But these charters left the constitution, privileges, and the class of burgesses unaltered (*c*).

There do not appear to have been any instances of boroughs constituted with self-elective councils till the time of the Tudors. In the latter part of that period, the local government in many boroughs became vested in small councils originally nominated by the Crown, and afterwards self-elected. This first step in the overthrow of the political independence of the boroughs was followed by further assaults in the time of the Stuarts. James I. and Charles I. added to the Parliamentary representation a large number of Parliamentary boroughs, in which the right of sending members to Parliament was vested in close corporate bodies (*d*).

Charles II., by proceedings of *Quo warranto*, procured the forfeiture of the charters of several towns, and induced others, from apprehension of similar proceedings, to surrender their charters, and submit to new charters being

(*a*) Madox, Firma Burgi, p. 242.
(*b*) Merewether and Stephens, Hist. of Boroughs, xxxiii.
(*c*) *Ibid.*, xxxvii. (*d*) *Ibid.*, Introduction, lii.

granted. The object of these proceedings may be sufficiently seen by Roger North's vehement apology for them. "The mischief," says he, "lay in towns that had justices of their own, with a clause that the justices of the country *ne intromittant*; so by excluding the country justices, they were become the ordinary asylums for all sorts of rogues that fled from justice of the sessions, and particularly from those that were tumultuous and seditious, and there found protection"(*a*). The hostility of the Court was particularly directed against the City of London, because it had maintained the privilege of electing the Sheriffs, and, consequently, the Court had not the power of packing juries in that city(*b*).

The municipal charters granted after the Revolution were framed for the most part so as to confer the municipal government on select bodies. It has been said that more was done during the reign of William III. to confirm the usurpations of corporations, the extensive rights of their councils, and the interference of non-residents, than in any other period of our history. The prerogative of granting charters was called into action to a less extent in subsequent reigns, and the majority of later charters were merely explanatory of former charters, or related to matters of detail. But the later charters, if they did not greatly increase the abuses of municipal corporations, effected little or nothing for their improvement(*c*).

The Commissioners appointed in 1833 to inquire into the state of municipal corporations in England and Wales, from whose Report several of the foregoing particulars are taken, concluded that "even where these institutions exist in their least imperfect form, and are most rightfully administered, they are inadequate to the wants of the present state of society. In their actual condition, where not productive of positive evil, they exist in the great majority of

(*a*) Roger North's Examen, part 3, ch. viii. § 54. (*b*) *Ante*, p. 356.

(*c*) See First General Report on Corporations, 1833; and Merewether and Stephens, Hist. of Boroughs, Introduction.

instances for no purpose of general utility. The perversion of the municipal institutions to political ends has occasioned the sacrifice of local interests to party purposes, which have been frequently pursued through the corruption and demoralization of the electoral bodies" (*a*).

The municipal corporations of England are now chiefly regulated by the important and comprehensive statute of the year 1835, entitled "An Act to provide for the Regulation of Municipal Corporations in England and Wales" (*b*). This Act does not abridge the prerogatives of the Crown of creating corporations or conferring franchises, but regulates the privileges and powers of nearly all the municipal corporations existing at the time the Act was passed, and enables the Crown to extend those powers to towns and boroughs subsequently incorporated upon petition of their inhabitant householders.

The province of the incorporate municipal governments comprises the superintendence of local police, the administration of justice in local courts subordinate to the supreme judicature, and the administration of laws relating to public order and public health. The municipal government is entrusted by the Act in question to a Town Council popularly elected. The electors are citizens, burgesses, or freemen, who are not to be for the future admitted by gift or purchase. The burgesses qualified by this Act to vote at municipal elections are (with some exceptions) all male householders resident within seven miles of the borough, paying poor-rates and borough-rates. Large boroughs are divided into wards, which elect their councillors severally.

The members of a Town Council are the Mayor, Aldermen, and Councillors. Of them are required additional qualifications respecting the property they possess, or for which they are rated. One-third of the Councillors are elected annually, and one-third who have been longest in

(*a*) First General Report on Corporations, 1833.
(*b*) 5 & 6 Will. IV. c. 76.

office retire annually, but are capable of being re-elected immediately. The number of Aldermen is one-third the number of Councillors, and the Aldermen are elected by the Council from the Councillors, or from persons qualified to be Councillors. One-half the number of Aldermen who have been longest in office retire every three years, but are capable of being re-elected (s. 25). The Council annually elect the Mayor out of the Aldermen and Councillors.

To the Town Council are entrusted all the deliberative and administrative functions of the Corporation; they appoint the municipal officers, and may also appoint committees, general and special. One of these, the "watch committee," presided over by the Mayor, regulates the police, and is empowered to appoint constables for the borough. The Council may accept a transfer of the powers vested in trustees appointed under local Acts for paving, lighting, etc., of boroughs, and has various powers of like kind conferred upon it in boroughs which are not under any such local Acts. The Council may make provisions for the suppression of nuisances by bye-laws subject to the approval of a Secretary of State; has control of the borough funds; may apply the surplus to local improvements; may order borough-rates, and has limited powers of sale and leasing lands belonging to the borough. Public libraries, and museums of art and science, erected in municipal boroughs under 13 & 14 Vict. c. 65, are placed under the control of the Town Councils.

In many *unincorporated towns,* some of the duties which in boroughs are entrusted to corporations, are confided to local Commissioners, elected usually by the ratepayers, under the authority of local Acts of Parliament. These Acts are very numerous, and differ in their provisions; but a knowledge of their general nature may be obtained by reference to "The Towns Improvement Clauses Act, 1847," which, as the preamble states, was passed in order "to comprise in one Act sundry provisions usually contained in Acts

of Parliament for paving, draining, cleansing, lighting, and improving towns and populous districts, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such towns or districts, as for ensuring greater uniformity in the provisions themselves." The Act provides that it shall extend only to such towns and districts in England and Wales as shall be comprised in any subsequent special Act which shall declare that this Act shall be incorporated therewith. The Act gives to the Commissioners, Trustees, or other persons, or body corporate, entrusted by the special Act with the execution of its provisions, various powers of appointing officers, purchasing lands, and executing works of paving, draining, and lighting towns, and for similar purposes. It is provided that where the Commissioners make any "special order," they shall give due notice of it; and if a majority of the ratepayers, who have votes in the election of the Commissioners, present a remonstrance against such order, it shall not be carried into effect. The Commissioners have certain powers of making rates to provide for the expenses of executing their powers, subject to appeal to the justices of the district, and ultimately to the Quarter Sessions, by any person interested who complains of the inequality or irregularity of the rate. The Commissioners have also a limited power of making bye-laws, and imposing penalties for breaches of them.

"The Local Government Act, 1858,"(*a*) may be adopted by the Councils of Corporate boroughs; by the Commissioners of places under the jurisdiction of Improvement Commissioners elected by ratepayers; and by the ratepayers of other places which have known boundaries, or who, by petition to a Secretary of State, obtain a settlement of such boundaries. In the places and districts in which the Act is adopted, it is carried into execution by local Boards, consisting of the town councils in boroughs, the improvement commissioners in towns under such jurisdic-

(*a*) 21 & 22 Vict. c. 98.

tion, and in other places local Boards elected by the ratepayers. The local Boards have extensive powers of undertaking and regulating the drainage and cleansing of towns, the suppression of nuisances, and similar matters of police.

In *Counties*, the chief local authorities of the civil administrative government are sheriffs and justices of the peace. The principal modern duties of the sheriffs are those which relate to Parliamentary elections, and the execution of legal processes and judgments, both which functions of the sheriffs have been already sufficiently described.

The civil administrative business of counties, so far as relates to matters of police, is managed chiefly by the county magistrates, who, as we have seen, are nominated by the Crown, and usually hold their offices for life. The most important administrative duties(*a*) of the county justices of the peace relate to the administration and application of *county rates*.

The most ancient local taxes were those imposed in towns and counties for compensations and amerciaments for offences committed or escapes allowed, for the maintenance of roads, watercourses, and sometimes bridges. Where boroughs sent burgesses to Parliament, the wages of the burgesses were raised by a town-rate(*a*). The earliest statutes frequently refer to local taxes as already existing. Among such statutes are the Statute of Westminster the First (3 Edw. I., A.D. 1275), which regulates the manner in which fines and amerciaments of counties for false judgments and other trespasses were to be assessed. We have adverted, in a former chapter(*b*), to the Anglo-Saxon system of making counties and hundreds answerable for crimes committed in them, and the statute of Winchester, by which counties and hundreds were required to make compensation for the loss occasioned by such crimes.

(*a*) Report of Poor Law Commissioners on Local Taxation. This Report was drawn up at the request of the Secretary of State for the Home Department, and printed among the papers presented to Parliament in 1843.

(*b*) *Ante*, p. 593.

The ancient purposes of the county rates "were to provide for the maintenance of the county courts, for the expenses incidental to the county police, and the civil and military government of the county; for the payment of common judicial fines; for the maintenance of places of defence (sometimes, however, provided by a separate tax common to the counties and other districts, called *burghote*), prisons, gaols, bridges (when these were not provided for by a separate tax common to counties and to other districts, called *brukbote*), and occasionally high roads, rivers, watercourses, and for the payment of the wages of knights of the shire. Additions to these purposes were made from time to time by statutes. The King's aids, taxes, and subsidies were usually first imposed upon the county, and collected as if they had been county taxes; but the first statute defining any of its present purposes (though now repealed as to the mode it prescribes for imposing the tax) was passed in the twenty-second year of the reign of Henry VIII. From that time up to the present new purposes have been constantly added, and up to the twelfth year of George II. new and distinct rates were constantly created for purposes of comparatively little importance, and to raise sums of money quite insignificant in amount" (*a*).

The statute 22 Hen. VIII. c. 5, here referred to, empowered the justices in general sessions to inquire of all "annoyance of bridges broken in highways," and to make a tax for their repair(*b*).

The assessment and collection of county rates in England and Wales are now principally regulated by an Act of 1852, 15 & 16 Vict. c. 81, which consolidates and amends the law, and repeals the former statutes on the subject. The Act provides that the county justices in sessions may appoint a committee to prepare a basis or standard for as-

(*a*) Report on Local Taxation, p. 8.

(*b*) Of common right all the county shall be charged to the reparation of a bridge, and as to that point the statute 22 Hen. VIII. c. 5 is but an affirmance of the common law. (13 Co. Rep. 33.)

sessing county rates according to the value of the property rateable. Of this basis, in which the total annual value of the property in the county is estimated, due notice is given, and all persons rateable are entitled to inspect it (s. 13), and to appeal against it to the Court of Quarter Sessions. This court is empowered, "whenever circumstances shall appear to require it," to order a county rate to be made for all the purposes to which the county stock or rate is liable according to the basis for the time being in force (s. 21). Persons aggrieved may appeal to the Quarter Sessions on the ground of inequalities, or omissions in the rate, or other just cause of complaint. The guardians of every union of parishes under the Poor Laws collect the rate in their union, in the same manner as poor-rates, and pay it to the county treasurer (s. 26). In parishes not comprised in such unions, the overseers generally collect the rate (s. 30). All business relating to the assessment and application of the rate by the Quarter Sessions is required to be transacted in open Court (s. 48).

The expenses to which counties are liable, and which are payable out of county rates, have been regulated by numerous statutes. A reference to the principal items of such expenditure will indicate the nature of the administrative business which devolves upon the justices in Quarter Sessions. The county rates are applied chiefly to the expenses of county constabulary, of prosecutions for felony, and some misdemeanours, of building and maintaining, and other expenses of county gaols and houses of correction; of the subsistence of prisoners therein, and of transporting felons, or conveying them to places of confinement(*a*).

(*a*) See Burns's 'Justice of the Peace,' 29th ed. 1845, tit. "County Rates."

The principal Act for the regulation of gaols is 4 Geo. IV. c. 64, extended by 1 & 2 Vict. c. 56. The former of these Acts empowers the justices in Quarter Sessions to make rules for the government of prisons within their jurisdiction, subject to the approval of the justices of gaol delivery, and by the Prisons Regulation Act, 5 & 6 Will. IV. c. 38, s. 2, of a Secretary of State. The county justices of every county are also now required, by 19 &

The justices in Quarter Sessions have also power of constituting districts in counties for the management of the highways in such districts, under the superintendence of Local Highway Boards(*a*).

The system of management of county rates is a remarkable exception to general constitutional principles respecting taxation. With respect to borough rates, the ordinary rule is applied, that taxes are not to be levied without the assent of the tax-payers or their representatives; the same rule applies generally as to parochial rates. But in counties, the application of the rates devolves upon justices of the peace appointed by Royal commission. It is remarkable that many of the most ancient county rates and burdens were more or less directly subject to popular control. The fines and amerciaments regulated by the Statute of Westminster the First just referred to, were required by that statute to be assessed before the Justices in Eyre by knights and other honest men (*des chivalers et des probes hommes*). A statute of Henry VI.(*b*) provides, to prevent extortion of sheriffs in assessing the wages of knights of the shire in Parliament, that the wages shall be assessed in full county court, in the presence of all the persons attending the court. Coke shows that, according to the provisions of Magna Charta, amerciaments such as those for the non-repair of bridges and highways, ought to be "affered" (that is, assessed) *per pares*(*c*). The principle of popular control over county rates and burdens is still more directly recognized by statutes of the reign of Henry VIII. One of them, already referred to, which relates to the repair of bridges, provides that the justices of the peace shall call before them the constables or two inhabitants of every town and parish liable to contribute, and with their assent assess the sum

20 Vict. c. 69, to appoint a sufficient police force therein, and the management of the county constabulary is under the control of county justices, subject to the superintendence of the Secretary of State.

(*a*) 25 & 26 Vict. c. 61. (*b*) 23 Hen. VI. c. 10, A.D. 1444.

(*c*) Griesley's Case, 8 Coke Rep. 40.

required for the repairs. Another statute of the same reign, which provides for the building of county gaols, requires the sums of money required for the purpose to be fixed by the justices, with the consent of "all the high constables, tithing-men, or borough-holders of every hundred, lathe, or wapentake in the shere whereof they be justices," or the major part of them (*a*). After the reign of Henry VIII. the general course of legislation with respect to county rates seems to have been to place the management of them in the hands of the county justices; but the powers given as above-mentioned to the inhabitants of counties with respect to county rates, do not appear to have been abrogated by statute until the reign of Queen Anne (*b*).

(*a*) 22 Hen. VIII. c. 5; 23 Hen. VIII. c. 2.
(*b*) 1 Anne, stat. 1, c. 18.

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JOHN EDWARD TAYLOR, PRINTER,
LITTLE QUEEN STREET, LINCOLN'S INN FIELDS.

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Government of Maharashtra
on 02 July, 2018

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